145-203

RECORD, CASE No. 13,289.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 228.

DELOS E. CULVER, PLAINTIFF IN ERROR,

vs.

GEORGE WILKINSON, RECEIVER OF THE AMERICAN TRUST COMPANY OF NEW JERSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 13, 1891.

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1 UNITED STATES OF AMERICA, } ss:
Second Circuit, Southern District of New York, }

To the honorable justices of the Supreme Court of the United States:

And now comes Delos E. Culver, of New York, by R. Floyd Clark, his attorney, and complains that in the records and proceedings and also in the rendition of judgment in a suit between George Wilkinson, receiver of the American Trust Company of New Jersey, plaintiff, and the said Delos E. Culver, defendant, tried in the circuit court of the United States for the southern district of New York, at the October term thereof, A. D. eighteen hundred and eighty-seven, and in which judgment was rendered against Delos E. Culver on the 23rd day of November, A. D. eighteen hundred and eighty-seven, manifest error hath intervened to the great
2 damage of the said Delos E. Culver.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid, and for a reversal of said judgment.

R. FLOYD CLARK,
Attorney for Plaintiff in Error,
146 *Broadway, New York, N. Y.*

Allowed Ap'l 30, 1888.
E. HENRY LACOMBE.

(Endorsed:) United States Supreme C't. Delos E. Culver, plaintiff in error, *vs.* George Wilkinson, receiver of the American Trust Company of New Jersey, defendant in error. Petition for writ of error. R. Floyd Clark, attorney for pl'ff in error, 146 Broadway, New York, N. Y. U. S. circuit court. Filed Apr. 30, 1888. Timothy Griffith, clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between George Wilkinson, receiver of the American Trust Company of New Jersey, plaintiff therein, who is defendant in error in this court, and Delos E. Culver, defendant therein, who is plaintiff in error in this court, and in which a judgment was rendered against the said defendant, Delos E. Culver, on the 23rd day of November, one thousand eight hundred and eighty-seven, a manifest error hath happened, to the great damage of the said Delos E. Culver, plaintiff in error, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,

that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of U. S. Circuit Court, South. Dist. New York.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed Ap'l 30th, 1888.
E. HENRY LACOMBE.

4 [Endorsed:] Supreme Court of the United States. Delos E. Culver, plaintiff in error, *vs.* George Wilkinson, receiver of the American Trust Company of New Jersey, defendant in error. Writ of error. Service of the within writ of error is hereby admitted this 2d day of May, 1888. Edgar P. Hill, att'y for def't in error; R. Floyd Clarke, attorney for pl'ff in error, 146 Broadway, New York, N. Y. 1.45. P'd. 4, 30, '88. U. S. circuit court. Filed May 7, 1888. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from five to one hundred and seventy-eight, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Delos E. Culver, plaintiff in error, against George Wilkinson, receiver of the American Trust Company of New Jersey, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

JOHN A. SHIELDS, *Clerk.*

The irregularity in the teste of writ, being in name of Morrison R. Waite, Chief Justice, deceased, is hereby waived.

2 day of May, 1888.

EDGAR P. HILL,
Att'y for Def't in Error.

5 United States Circuit Court, Southern District of New York.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Plaintiff,
against
DELOS E. CULVER, Defendant.

To the clerk of the circuit court of the United States for the southern district of New York:

SIR: Please issue a summons in the above-entitled cause, with notice.

EDGAR P. HILL,
Attorney for Plaintiff, 200 *Broadway, New York.*

(Endorsed:) U. S. circuit court, south. dist. of N. Y. George Wilkinson, rec'r, pl'ff, *vs.* Delos E. Culver, def't. Præcipe. Edgar P. Hill, pl'ff's att'y, 200 B'dway, N. Y. U. S. circuit court. Filed Dec. 3, 1883. Timothy Griffith, clerk.

6 United States Circuit Court for the Southern District of New York.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
against
DELOS E. CULVER.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 3rd day of December, in the year one thousand eight hundred and eighty-three.

TIMOTHY GRIFFITH, *Clerk.*

[SEAL.] EDGAR P. HILL,
Plaintiff's Attorney.

Office and post-office address, 200 Broadway, N. Y. city, N. Y.

7 (Endorsed:) United States circuit court, southern district of New York. George Wilkinson, receiver of the American

Trust Company of New Jersey, *vs.* Delos E. Culver. Summons. Edgar P. Hill, plaintiff's attorney. To the defendant within named: Take notice that upon default judgment will be taken for the sum of sixty thousand dollars in money, with interest from the 31st of May, 1875, besides costs. Edgar P. Hill, plaintiff's attorney, 200 Broadway, N. Y. city. U. S. marshal's office, S. D. N. Y.: Received Dec. 3, 1883. U. S. marshal's office, New York, Dec. 3, 1883: I hereby depute Wm. T. Smith to serve the within writ. Joel B. Erhardt, U. S. marshal. United States of America, southern district of New York, *ss:* William T. Smith, being duly sworn, deposes and says that on the 3rd day of December, 1883, at No. 38 Pine St., N. Y. city, I personally served the within summons on the within-named defendant, Delos E. Culver, by showing him the same and delivering to and leaving with him true copy thereof. Wm. T. Smith. Subscribed and sworn to before me this 3rd day of December, 1883. E. C. Marshall, notary public, N. Y. Co. (Seal.) I hereby certify that on the 3rd day of Dec., 1883, at the city of New York, in my district, the within summons was served upon the within-named Delos E. Culver at the time and in the manner described in the annexed affidavit of Wm. T. Smith. Dated Dec. 6th, 1883. Joel B. Erhardt, U. S. marshal, S. D. N. Y. U. S. circuit court. Filed Dec. 6, 1883. Timothy Griffith, clerk.

8 United States Circuit Court, Southern District of New York.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
against
DELOS E. CULVER.
} Notice of Appearance.

To the clerk of the U. S. circuit court, southern district of New York.

SIR: Please take notice that I am retained by and appear for the defendant, Delos E. Culver, in the above action, and I desire that my appearance be entered herein accordingly.

Dated N. Y., Dec. 24th, 1883.

Yours, &c., JAMES W. CULVER,
Attorney for Def't.

Office and P. O. address, 170 Broadway, New York city.

(Endorsed:) U. S. circuit court, southern district of New York. George Wilkinson, receiver, &c., *vs.* Delos E. Culver. Notice
9 of appearance. To clerk U. S. circuit ct., so. district N. Y. Jas. W. Culver, att'y for def't, 170 B'dway, N. Y. city. U. S. circuit court. Filed Dec. 24, 1883. Timothy Griffith, clerk.

10 In the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
vs.
DELOS E. CULVER.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George Wilkinson, the plaintiff herein, by Edgar P. Hill, his attorney, respectfully shows to the court:

First. That the above-named plaintiff is a resident of the State of New Jersey, and that the defendant herein is a resident of the State of New York and resides within the jurisdiction of this court, to wit, in the city and county of New York.

Second. That at the times hereinafter mentioned the New Jersey supreme court of the State of New Jersey was a court of general jurisdiction, duly created by the laws of that State.

Third. That in or about the month of March, 1879, the plaintiff commenced an action in said court against the defendant, in which action the said defendant was duly summoned.

Fourth. That such proceedings were thereupon had that on the 31st day of May, 1879, in said action the plaintiff recovered judgment, which was duly given by said court, against the de-
11 fendant for the sum of fifty-four thousand two hundred and sixty-three and $\frac{33}{100}$ dollars; which said judgment is herein set forth, as follows:

New Jersey Supreme Court.

NEW JERSEY, *To wit:*

The State of New Jersey to all to whom these presents may come, Greeting:

Know ye that we have inspected the records and files of our supreme court — do find there remaining a certain judgment in the words and figures following, to wit:

[SEAL.]

GEORGE WILKINSON, Receiver, &c., of the American Trust Company of New Jersey,
vs.
DELOS E. CULVER.

In Case. By Default, &c. C. and A. Wayne Parker, Attorneys.

As yet of the twenty-sixth day of March, A. D. eighteen hundred and seventy-nine.

Witness:

MERCER BEASLEY, ESQUIRE,
Chief Justice.

BENJAMIN F. LEE, *Clerk.*

ESSEX COUNTY, *ss:*

Delos E. Culver, the defendant in this suit, was summoned to answer unto George Wilkinson, receiver for the creditors
12 and stockholders of the American Trust Company of New Jersey, the plaintiff therein, of a plea of trespass on the case upon promises; and thereupon the plaintiff, by Cortlandt and A. Wayne Parker, his attorneys, complains and says that after the making and delivery of the promissory notes hereafter mentioned, to wit, on the eighth day of January, in the year one thousand eight hundred and seventy-nine, at Trenton, to wit, in the county aforesaid, by a certain order then and there made in the court of chancery of the State of New Jersey, in a certain cause wherein Frederick Hood, Charles N. Lockwood, and Alexander Turnbull, who sue for themselves and such creditors and stockholders as may contribute, &c., were complainants and the said The American Trust Company of New Jersey were defendants, it was ordered that the plaintiff in this suit should be, and he was thereby, appointed receiver, with full power to demand and sue for, collect, and receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of any and every description belonging to the said The American Trust Company of New Jersey at the time of their expiration of business, and to do and perform all the duties imposed upon him and required by law, and especially by an act entitled "An act to prevent frauds by incorporated companies," passed April 18th, 1846.

And the plaintiff avers that the said several promissory notes in this declaration mentioned at the time of expiration of business of said The American Trust Company of New Jersey, to wit,
13 on the eighth day of January, one thousand eight hundred and seventy-nine, at Newark, to wit, at Jersey City, in the county aforesaid, were the property of and belonged to the said The American Trust Company of New Jersey, and then and ever since remained unpaid, and by the force of the said order of said court of chancery and of the statute in such case made and provided then and there became and are the property of the plaintiff.

And the said plaintiff brings into court here the record of the said proceedings in said suit in chancery and of the said order constituting him such receiver, and therefore the said plaintiff complains:

For that whereas the said defendant heretofore, to wit, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, five thousand and forty-six $\frac{44}{100}$ dollars, without defalcation or discount, for value received, at the office of said American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect thereof, to wit, on the first day of April next after said date of said note, the said note was duly presented for payment at the office of said
14 American Trust Company of New Jersey, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, fifty-five hundred and eighty-eight $\frac{95}{100}$ dollars, without defalcation or discount, for value received, at the office of said American Trust Company of New Jersey, and then and there delivered the said last note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said promissory note became due and payable according to the tenor and effect thereof, to wit, on the first day of May next after said date of said note, the said note was duly presented for payment at the
15 office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the third day of December, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of The American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, five thousand and eighty-four $\frac{46}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New

Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said promissory note became due and payable according to the tenor and effect thereof, to wit, on the sixth day of May next after said date of said note, the said note was duly presented for payment at the
16 office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one in his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and seventy-seven, at Jersey City, to wit, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of the American Trust Company of New Jersey five months after said date thereof, which period has now elapsed, three thousand five hundred and ninety-eight $\frac{25}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said promissory note became due and payable according to the tenor and effect thereof, to wit, on the third day of June next after said
17 date of said note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fifth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of the American Trust Co. of New Jersey six months after said date thereof, which period has now elapsed, fifty-one hundred

and forty-nine and $\frac{75}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect thereof, to wit, on the eight- day of July next after said date of said
18 note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specefied was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of the American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, fifty-one hundred and twenty-seven $\frac{63}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect thereof, to wit, on the eighteenth day of June next after said date of
19 said note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of The American Trust Co. of New Jersey three months after

said date thereof, which period has now elapsed, five thousand and sixty-two $\frac{90}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect
20 thereof, to wit, on the eighteenth day of April next after said date of said note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there, on the day last aforesaid, had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fifteenth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of the American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, forty-four hundred thirty-seven $\frac{97}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Co. of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect
21 thereof, to wit, on the eighteenth day of July next after said date of said note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to

the order of the American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, fifty-one hundred and seventy $\frac{55}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect thereof, to wit, on the twenty-eight- day of July next after said date of
22 said note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the second day of March, in the year of our Lord one thousand eight hundred and seventy-eight, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of the American Trust Co. of New Jersey five months after said date thereof, which period has now elapsed, fifty-six hundred and ninety-two $\frac{50}{100}$ dollars, without defalcation or discount, for value received, at the office of said The American Trust Company of New Jersey, and then and there delivered the said note to said The American Trust Company of New Jersey.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect thereof, to wit, on the fifth day of August next after said date of said
23 note, the said note was duly presented for payment at the office of said company, in Newark, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any — on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain other promissory note in writing, dated the day and year

last aforesaid, and thereby then and there promised to pay to the order of John McGregor two months after said date thereof, which period has now elapsed, two hundred dollars, without defalcation or discount, for value received, at Hudson Co. National Bank, Jersey City, and then and there delivered the said note to said John McGregor, who thereupon transferred the same to said The American Trust Company of New Jersey by indorsing said note in blank without recourse and delivering the same to said company.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect
24 thereof, to wit, on the seventh day of November next after said date of said note, the said note was duly presented for payment at said Hudson Co. National bank, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither the said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain other promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of John McGregor three months after said date thereof, which period has now elapsed, two hundred dollars, without defalcation or discount, for value received, at Hudson County National Bank, Jersey City, and then and there delivered the said note to said John McGregor, who thereupon transferred the same to said The American Trust Company of New Jersey by indorsing said note in blank without recourse and delivering the same to said company.

And the said plaintiff avers that afterwards and when
25 said note become due and payable according to the tenor and effect thereof, to wit, on the seventh day of December next after said date of said note, the said note was duly presented for payment at said Hudson County National bank, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be ther-unto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made certain promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of John McGregor four months after said date thereof, which period has now elapsed, two hundred dollars, without defalcation or discount, for value received, at Hudson County National Bank, Jersey City, and then and there delivered the said note to said John McGregor, who thereupon transferred the same to said The American Trust Company of New Jersey by indorsing said note in blank without recourse and delivering the same to said company.

And the said plaintiff avers that afterwards and when
26 said note became due and payable according to the tenor and effect thereof, to wit, on the seventh day of January next after said date of said note, the said note was duly presented for payment at said Hudson County National bank, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of John McGregor five months after said date thereof, which period has now elapsed, two hundred dollars, without defalcation or discount, for value received, at Hudson County National Bank, Jersey City, and then and there delivered the said note to said John McGregor, who thereupon transferred the same to said The American Trust Company of New Jersey by endorsing note in blank without recourse and delivering the same to said company.

27 And the said plaintiff avers that afterwards, when said note became due and payable according to the tenor and effect thereof, to wit, on the seventh day of February next after said date of said note, the said note was duly presented for payment at Hudson County National bank, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards,

on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the said defendant heretofore, to wit, on the fourth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, at Newark, in said county, made his certain promissory note in writing, dated the day and year last aforesaid, and thereby then and there promised to pay to the order of John McGregor six months after said date thereof, which period has now elapsed, two hundred dollars, without defalcation or discount, for value received, at Hudson County National Bank, Jersey City, and then and there delivered the said note to said John McGregor, who thereupon transferred the same to said The American Trust Company of New Jersey by endorsing said note in
28 blank without recourse and delivering the same to said company.

And the said plaintiff avers that afterwards and when said note became due and payable according to the tenor and effect thereof, to wit, on the seventh day of March next after said date of said note, — was duly presented for payment at said Hudson County National bank, to wit, at Newark aforesaid, and payment of the money therein specified was then and there required according to the tenor and effect thereof; but neither said Delos E. Culver, the defendant, nor any one on his behalf did or would pay the said money, of which the defendant there on the day last aforesaid had notice, whereby the defendant then and there became liable to pay to the plaintiff the said sum of money in the said last note specified when he should be thereunto afterwards requested, and afterwards, on the fifteenth day of March last past, in consideration thereof, there promised the plaintiff to pay him the said sum on request.

And for that whereas the defendant heretofore, to wit, on the fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-nine, at Newark, to wit, at Jersey City, in the county of Hudson, was indebted to the plaintiff in the sum of one hundred thousand dollars for interest upon and for the forbearance by the plaintiff to the defendant at his request of divers large sums of money before that time — and owing from the defendant to the plaintiff, and in one hundred thousand dollars for so much money then and there found to be due from the defendant to the plaintiff on an account stated between them, and, being so indebted,
29 the defendant, in consideration thereof, then and there promised to the plaintiff to pay him the said several sums of money on request, yet the defendant disregarded his said several promises and has not paid the said several sums of money or any part thereof, though often requested so to do, but to do so has hitherto wholly refused and still does refuse, to the damage of the plaintiff one hundred thousand dollars.

Wherefore the said plaintiff saith that he is injured and hath, as such receiver, sustained damage to the amount of one hundred thousand dollars, and therefore he brings his suit.

Notice is hereby given that this action is brought to recover the

amount due on certain promissory notes, of which the following are copies:

$5,046.44. NEWARK, N. J., *October 29th*, 1877.

Five months after date I promise to pay to the order of American Trust Co. of New Jersey five thousand & forty-six $\frac{44}{100}$ dollars, at their office, value received.

No. L. 310.

Due April 1st.

D. E. CULVER.

$5,588.95. NEWARK, N. J., *Nov'r 28th*, 1877.

Five months after date I promise to pay to the order of American Trust Co. of New Jersey fifty-five hundred & eighty-eight $\frac{95}{100}$ dollars, at their office, value received.

No. L. 315.

Due May 1.

D. E. CULVER.

30 $5,084.46. NEWARK, N. J., *Dec'r 3rd*, 1877.

Five months after date I promise to pay to the order of The American Trust Co. of New Jersey five thousand & eighty-four $\frac{46}{100}$ dollars, at their office, value received.

No. L. 316.

Due May 6.

D. E. CULVER.

$3,598.25. JERSEY CITY, N. J., *December 31st*, 1877.

Five months after date I promise to pay to the order of The American Trust Co. of New Jersey thirty-five hundred and ninety-eight $\frac{25}{100}$ dollars, payable at their office, in Newark, N. J., value received.

No. L. 324.

Due June 3.

D. E. CULVER.

$5,149.75. NEWARK, N. J., *January 5th*, 1878.

Six months after date I promise to pay to the order of The American Trust Co. of New Jersey fifty-one hundred & forty-nine $\frac{75}{100}$ dollars, at their office, value received.

No. 325.

Due July 8th.

D. E. CULVER.

$5,127.63. NEWARK, N. J., *January 15th*, 1878.

Five months after date I promise to pay to the order of The American Trust Co. of New Jersey fifty-one hundred & twenty-seven $\frac{63}{100}$ dollars, at their office, value received.

No. L. 333.

Due June 18.

D. E. CULVER.

31 $5,062.90. NEWARK, N. J., *January 15th*, 1878.

Three months after date I promise to pay to the order of The American Trust Co. of New Jersey five thousand & sixty-two $\frac{90}{100}$ dollars, at their office, value received.

No. L. 332.

Due April 18.

D. E. CULVER.

$4,437.97. NEWARK, N. J., *Feb. 15th*, 1878.

Five months after date I promise to pay to the order of The American Trust Co. of New Jersey forty-four hundred & thirty-seven $\frac{97}{100}$ dollars, at their office, value received.

No. L. 335.

Due July 18.

D. E. CULVER.

$5,170.25. NEWARK, N. J., *February 25th*, 1878.

Five months after date I promise to pay to the order of The American Trust Co. of New Jersey fifty-one hundred & seventy $\frac{55}{100}$ dollars, at their office, value received.

No. L. 337.

Due July 28.

D. E. CULVER.

$5,692.50. NEWARK, N. J., *March 2nd*, 1878.

Five months after date I promise to pay to the order of The American Trust Co. of New Jersey fifty-six hundred & ninety-two $\frac{50}{100}$ dollars, at their office, value received.

No. L. 336.

Due Aug. 5.

D. E. CULVER.

32 $200. NEWARK, N. J., *Sept. 4th*, 1877.

Two months after date I promise to — the order of John McGregor two hundred dollars at Hudson Co. Nat. Bank, Jersey City, value received.

No. 2712.

Due Nov. 7.

D. E. CULVER.

(Endorsed:) Without recourse.
" John McGregor.

$200. NEWARK, N. J., *Sept. 4th*, 1877.

Three months after date I promise to pay to the order of John McGregor two hundred dollars at Hudson Co. Nat. Bank, Jersey City, value received.

No. 2713.

Due Dec. 7.

D. E. CULVER.

(Endorsed:) John McGregor.* Without recourse.

$200. NEWARK, N. J., *Sept. 4th*, 1877.

Four months after date I promise to pay to the order of John McGregor two hundred dollars at Hudson Co. Nat. Bank, Jersey City, value received.

No. 2714.

Due Jan'y 7th.

D. E. CULVER.

(Endorsed:) Without recourse. John McGregor.

$200. NEWARK, N. J., *Sept. 4th*, 1877.

Five months after date I promise to pay to the order of
33 John McGregor two hundred dollars at Hudson Co. Nat. Bank, Jersey City, value received.

No. 2715.

Due Feb'y 7th.

D. E. CULVER.

(Endorsed:) Without recourse. John McGregor.

$200. NEWARK, N. J., *Sept. 4th*, 1877.

Six months after date I promise to pay to the order of John McGregor two hundred dollars at Hudson Co. Nat. Bank, Jersey City, value received.

No. 2716.

Due Mar. 7.

D. E. CULVER.

(Endorsed:) Without recourse. John McGregor.

And that judgment will be claimed for the amount of said notes respectively and lawful interest thereon.

And now, at this day, to wit, the thirty-first day of May, A. D. eighteen hundred and seventy-nine, before the supreme court of the State of New Jersey, at Trenton, comes the said plaintiff, receiver, &c., as aforesaid, by his attorneys aforesaid, and the said defendant, though solemnly called, comes not, but makes default; and hereupon the plaintiff prays judgment and his damages by reason of the premises in his declaration mentioned to be assessed and adjudged to him, and, the same having been duly assessed at fifty-four thousand two hundred and twenty-eight dollars and twenty-five cents, besides thirty-five dollars and eight cents, costs and charges in this behalf expended—

Therefore it is considered that the said plaintiff, receiver,
34 &c., as aforesaid, do recover against the said defendant his said damages in form aforesaid assessed to fifty-four thousand two hundred and twenty-eight dollars and twenty-five cents, and also thirty-five dollars and eight cents, costs and charges aforesaid,

* Erased in copy.

by the court now here adjudged to the said plaintiff and with his assent; which said damages, costs, and charges in the whole amount to fifty-four thousand two hundred and sixty-three dollars and thirty-three cents.

Judgment signed this thirty-first day of May, A. D. eighteen hundred and seventy-nine.

M. BEASLEY, *Ch. Jus.*

All which we have by these presents caused to be exemplified and the seal of our supreme court to be hereunto affixed.

In testimony whereof I, Benjamin F. Lee, clerk of said supreme court, have hereto set my hand and affixed the seal aforesaid, at Trenton, this twenty-third day of January, A. D. eighteen hundred and eighty-two.

BENJ. F. LEE, *Clerk.*

I, Mercer Beasley, chief justice of the supreme court of the State of New Jersey, in conformity to the laws of the United States of America in such case made and provided, do certify that on the twenty-third day of January instant Benjamin F. Lee, Esquire, was and now is clerk of said court; that the attestation of said clerk to the foregoing record is the attestation of said clerk and the signature "Benj. F. Lee" his genuine signature, and that the seal
35 thereto affixed is the seal of said court, and that said record and his attestation is in due form of law.

Witness my hand, at Trenton, this twenty-third day of January, A. D. eighteen hundred and eighty-two.

M. BEASLEY, *J.*

I, Benjamin F. Lee, clerk as aforesaid, do hereby certify that Hon. Mercer Beasley, whose name is signed to the foregoing certificate of attestation, was at the time of signing the same chief justice of said supreme court, duly commissioned and sworn, and that full faith and credit are due to all his acts as such as well in all courts as elsewhere, and that the signature to said certificate is in the proper handwriting of said chief justice.

In testimony whereof I have hereto set my hand and the seal of
[SEAL.] said court, at Trenton, this twenty-third day of January, A. D. eighteen hundred and eighty-two.

BENJ. F. LEE, *Clerk.*

Fifth. That neither the said judgment nor any part thereof has been paid except as follows:

On the 16th day of February, 1880, plaintiff received from defendant herein the sum of four thousand five hundred and thirty-two and $\frac{50}{100}$ dollars on account of said judgment. $4,532.50.

On the 6th day of April, 1881, plaintiff received from de-
36 fendant herein the sum of five thousand dollars on account of said judgment. $5,000.00.

On the 29th day of January, 1882, plaintiff received from defendant herein the further sum of one thousand two hundred and fifty dollars on account of said judgment. $1,250.00.

That such sums above set forth have been duly placed to the credit of said defendant, and that no part of the balance of said judgment has been paid; that said balance now amounts to forty-three thousand four hundred and eighty and $\frac{83}{100}$ dollars, besides the interest that has accrued on said judgment from the entry thereof to date.

Wherefore plaintiff prays this court that judgment be granted in favor of said plaintiff and against said defendant for said sum now due, with interest, and such other and further relief as to this court may seem proper, besides the costs of this action.

EDGAR P. HILL,
Plaintiff's Attorney, 200 *Broadway, New York.*

CITY & COUNTY OF NEW YORK, *ss:*

Edgar P. Hill, being duly sworn, says that he is the attorney of the plaintiff in this action, and resides in the city and county of New York; that the foregoing complaint is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he
37 believes it to be true.

Deponent further says that the reason why this verification is not made by the plaintiff is that the action is founded upon a written instrument for the payment of money only, to wit, an exemplified copy of a judgment rendered in favor of the plaintiff and against the defendant herein in the New Jersey supreme court and duly certified by the chief justice of said court and also by the clerk of said court, which said written instrument is in the possession of the deponent as attorney as aforesaid.

Deponent further says that another reason why this verification is not made by the plaintiff is that the plaintiff is not a resident within the county where this action is brought, and all the facts alleged in the above complaint are within the knowledge of the attorney, the deponent herein, and his knowledge is derived from the exemplified copy of the judgment now in his possession and from information received from the plaintiff.

EDGAR P. HILL.

Sworn to before me this 10th day of January, 1884.
JOHN R. MANLEY,
Notary Public (144), *New York Co.*

(Endorsed:) U. S. circuit court. George Wilkinson, rec'r, &c., *vs.* Delos E. Culver. Complaint. Edgar P. Hill, pl'ff's att'y, 200 Broadway, N. Y. city. Due service of a copy of the within complaint is this day admitted. James W. Culver. Dated N. Y., Jan'y 12, 1884, by F. F. C. U. S. circuit court. Filed Jan. 12, 1884. Timothy Griffith, clerk.

38 At a stated term of the United States circuit court for the southern district of New York, held in the court-rooms of

said court, in the post-office building, in the city of New York, on the 29th day of October, 1885.

Present: Hon. Alfred C. Coxe, judge.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
against
DELOS E. CULVER.

On reading and filing the stipulation by and between the respective parties to the above-entitled action and hereunto annexed, dated October 29th, 1885, ordered that the bill of complaint herein be amended by striking out the word resident where it occurs in the first paragraph of said bill and by inserting the word citizen in place thereof.

ALFRED C. COXE.

39 United States Circuit Court for the Southern District of New York, in the Second Circuit.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
against
DELOS E. CULVER.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action that the bill of complaint herein be amended by striking out the word resident and inserting the word citizen in place thereof wherever said word occurs in the first paragraph of said bill of complaint, and that an order be entered in accordance with this stipulation.

Dated October 29th, 1885.

EDGAR P. HILL,
Attorney for Plaintiff.
JAS. W. CULVER,
Attorney for Defendant.

(Endorsed:) United States circuit court, southern dist. N. Y. George Wilkinson, receiver, &c., against Delos E. Culver. Stipulation and order amending bill of complaint. U. S. circuit court. Filed Dec. 10, 1885. Timothy Griffith, clerk.

40 At a stated term of the United States circuit court for the southern district of New York, held at the court-rooms of said court for said district, in the post-office building, in the city of New York, on the 11th day of December, 1885.

Present: Hon. Alfred C. Coxe, judge.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
vs.
DELOS E. CULVER.

On reading and filing the following consent of James W. Culver,

Esq., and on motion of R. Floyd Clarke, Esqur., it is ordered that R. Floyd Clarke, Esquire, of the city of New York, be substituted as the attorney and counsel of the defendant in the above-entitled action.

I hereby consent that R. Floyd Clarke, of the city of New York, be substituted in my place as attorney and counsel for the defendant in the above-entitled action, and that the foregoing order be entered without further notice.

JAMES W. CULVER,
Attorney for Defendant.

(Endorsed:) U. S. circuit court, southern dist. of New York. George Wilkinson, receiver of, etc., *vs.* Delos E. Culver. Consent and order of substitution. Clarke & Culver, att'ys for defendant, 170 Broadway, New York city. U. S. circuit court. Filed Dec. 11, 1885. Timothy Griffith, clerk.

41 In the Circuit Court of the United States for the Southern District of New York.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Plaintiff,
vs.
DELOS E. CULVER, Defendant.

The defendant, answering the complaint herein, through his attorney, R. Floyd Clarke—

1. Admits the first, second, and third paragraphs thereof.

2. Admits so much of the fourth paragraph of said complaint down to the words "which said judgment is herein set forth as follows" as alleges that on the 3rd day of May, 1879, in said action the plaintiff recovered judgment in said court against the defendant for the sum of fifty-four thousand two hundred and sixty-three and $\frac{33}{100}$ dollars.

3. Admits that a copy of said judgment-roll is set forth in paragraph fourth of the said complaint, but in so far as the facts stated in said copy as to the causes of action therein sued on may
42 be claimed or taken as allegations of the said complaint to the facts therein stated this defendant denies each and every allegation so stated and alleged in said copy of said judgment-roll contained in said paragraph fourth of said complaint except as herein expressly admitted. Admits the allegations of said complaint from the words "to wit, in the county aforesaid, by a certain order," in folio 10th, to and including the words "April 18, 1876," in the 12th folio thereof.

4. Denies the allegation contained in paragraph fifth of the said complaint, that neither the said judgment nor any part thereof has been paid except as follows.

5. Denies that the credits given in paragraph fifth of the complaint are correct, and alleges that much larger and greater sums should be credited on the said judgment or on any existing indebt-

edness, if any, of the defendant to the said trust company or the plaintiff.

6. Denies each and every allegation in paragraph fifth of the said complaint from the words "that no part of the balance of said judgment has been paid," etc., to the end of said paragraph.

7. Alleges that the said judgment, a copy of which is set forth in paragraph fourth of the complaint, was obtained and entered
43 upon the understanding, stipulation, and agreement between the plaintiff and defendant hereinafter stated, and that the attempt of the plaintiff herein to enforce the said judgment is a fraud upon the rights of the defendant and in breach and violation of the agreement upon which said judgment was allowed to be taken.

8. Alleges and avers, upon information and belief, that the said judgment has, under and by virtue of the agreement and facts hereinafter stated, been paid. Defendant further alleges that the credits upon said judgment allowed by said receiver in said fifth paragraph of said complaint are credits arising upon sums alleged to have been realized by said receiver out of the collaterals held by him to secure said judgment hereinafter mentioned, and that this defendant has never recognized in any way the validity of said judgment or made any payment thereon except in the manner hereinafter stated.

9. That the history of the transactions out of which said judgment arose is as follows:

Heretofore, to wit, on the 2nd day of August, 1873, at Newark, in the State of New Jersey, the defendant made and delivered to the American Trust Company of New Jersey his promissory note in writing for fifteen thousand dollars, payable to the order of said company four months after date, and thereupon the said company paid and this defendant received for said note for fifteen thousand dollars about the sum of fourteen thousand four hundred dollars upon the usurious agreement between the said trust company
44 and this defendant that the defendant should pay the said trust company and the said trust company should secure and reserve to themselves for the loan of said money a greater sum than at the rate of seven per cent. per annum, to wit, at the rate of twelve per cent. per annum.

10. That thereafter and on the twelfth day of August, 1873, at Newark, in the State of New Jersey, the defendant made and delivered to the said American Trust Company of New Jersey his promissory note in writing, dated at that date, for fifteen thousand dollars, payable to the order of said company four months after date, and thereupon the said company paid and this defendant received for said note of fifteen thousand dollars about the sum of fourteen thousand four hundred dollars upon the usurious agreement between the said trust company and this defendant that the defendant should pay the said trust company and the said trust company should secure and reserve to themselves for the loan of said money a greater sum than at the rate of seven per cent. per annum, to wit, at the rate of twelve per cent. per annum.

11. That, according to the laws of the State of New Jersey existing

at the times of the said loans and thereafter to this date, with the exception that on July 4, 1878, the legal rate of interest in said State was changed to the rate of six per cent. per annum in place of seven per cent. per annum, it is provided that no person shall upon any contract take, directly or indirectly, for the loan of any money
45 above the rate of seven per cent. per annum. (New Jersey Public Laws, 1866, p. 406; Revised Statutes, 795, sec. 1.) The said laws further provided that in all cases at law or in equity to enforce any note, etc., for the payment of any money loaned on which a larger rate of interest shall be reserved or taken than is allowed by the law of the place of the contract the amount or value actually loaned, without interest or costs of suit, may be recovered and no more. (New Jersey Public Laws, 1864, p. 714.) Said laws further provided that every person offending against said usuary law might be compelled to answer as a witness in any suit he might bring at law or in equity as to his agreement to receive or the receipt by him of any money in violation of said usuary law. Said laws further provide that any borrower of money may exhibit a bill in chancery against the lender and compell him to discover on oath the money really lent and all agreements relative to such loan, and if it shall appear that more than lawful interest was taken or reserved the lender shall be obliged to accept his principal money without any interest or other consideration and to pay costs.

12. At the time of the making and delivery of the said notes and the said usurious loans the defendant delivered to the said American Trust Company as collateral therefor forty-nine first-mortgage bonds, of one thousand dollars each, of the New York and Oswego Midland Railroad Company, known as Western Extension bonds, of the par value of forty-nine thousand dollars; twenty-four of said bonds, of $1,000 each, on the first note, and twenty-five
46 of said bonds, of $1,000 each, on the second note.

13. The defendant was then and thereafter engaged in business operations and contracts with the Montclair Railway Company, the New York and Oswego Midland Railway Company, and other railways and persons and had loaned his credit to said railroads and persons as well as large amounts of money and work and services for which he held securities of said companies. At said time the failure of J. Cooke & Co. took place, about the 3rd day of September, 1873, and caused a financial crash and sudden discrediting of all new railroad companies and their securities and rendered such securities unavailable and almost valueless. In consequence of such collapse and depreciation in the value of such securities this defendant was compelled to and did fail shortly thereafter and was proceeded against in bankruptcy on the 23rd day of September, 1873, by one or more of his creditors in the district court of the United States for the district of New Jersey (in which district this defendant resided).

14. Such proceedings were thereupon had that on the 7th day of October, 1873, this defendant was adjudicated a bankrupt, and on the 5th day of November, 1873, Washington B. Williams was appointed assignee in bankruptcy of this defendant and duly consented

to and accepted said trust and duly entered upon the discharge of his duties therein, and on the same day last mentioned the registrar in bankruptcy assigned all the defendant's estate to the said assignee, and on the first day of December, 1874, a judgment and decree
47 was duly rendered in said proceedings in which it was decreed that this defendant be, and he thereby was, discharged from all debts and claims which, by the United States bankrupt act then in force, were made proveable against his estate and which existed on the 23rd day of September, 1873, except in such debts, if any, as are by said act exempted from the operation of a discharge in bankruptcy; and the fact is that the said claim of the said trust company was proveable under said act in said bankruptcy proceedings and also existed on the 23rd day of September, 1873, and was not a debt or claim exempted by said act from the operation of a discharge in bankruptcy.

15. The defendant, being anxious, although discharged from his indebtedness by said bankruptcy proceedings, to pay off all his individual debts, of which the above were two, set to work for that purpose to devise ways and means of doing so. Most of the assets of the defendant included in the bankruptcy schedules filed in said proceeding- were perfectly valueless to any one unless they were disposed of by the purchase-s under the advice of the defendant, who had a vast amount of knowledge in relation thereto, which no one else could avail themselves of or get the benefit of said assets without the co-operation, labor, care, time, and knowledge of the defendant. The fact is also that many of his bankruptcy assets which were sold by his assignee, and especially such as were claims, required the use of considerable sums of money to prosecute the
48 same so as to realize anything upon them, and the defendant was utterly unable to pay such expenses. The making available such claims also required the personal attention of the defendant, the hunting up of evidence, and his attendance as a witness to establish the validity of the same. In order to carry out the design he had formed to pay all his said individual creditors, though their claims were discharged, he determined, without at once agreeing to renew said discharged debts, to give that advice, co-operation, labor, care, time, and knowledge to and for the benefit of his said individual creditors, whose debts were discharged.

16. The said trust company was one of the individual creditors of the defendant, and before the sale of defendant's assets hereinafter mentioned the defendant informed John McGregor, recently, before the president of said trust company and then a director thereof, of his plan for paying off such indebtedness, notwithstanding he was discharged therefrom, and of such proposed sale of assets, and in consequence of the uncertaint*ity* of the value of bankruptcy assets and the probability of cost in realizing on them it was likely they would be sold for a very small sum, and gave him information as to the collect*a*bility and probable expense of collecting the claims against Allen, Stephens and Co., George Opdyke & Co., and the New York and Oswego Midland Railroad Company. The said McGregor thereupon authorized the defendant to buy said claims, and agreed

to consider whatever the company received thereout as payment as such discharged indebtedness to that extent, and agreed to
49 advance the expense of prosecuting the claims hereinafter mentioned against Allen, Stephens and Company and others. The defendant, in pursuance of such an arrangement, bought, in the name of said McGregor, said claims on or about the 28th day of October, 1875, for $9 (the claim against Allen, Stephens & Co. for $5, and that against George Opdyke & Co. and the New York and Oswego Midland Railroad Company for $2 each).

17. In the month of January, 1876, the extension of time to the Jersey City and Albany Railroad Company to pay their debts ran out. The defendant was perfectly acquainted with the road and its value, and conceived the idea of inducing those interested in said railroad to form a reorganization of said company, and believed he could by his knowledge enable the said trust company to realize considerable sums of money out of the old securities of the Jersey City and Albany Railroad Company if he could induce the trust company to embark with him in a joint enterprise for that purpose. With this end in view, he laid before the officers of said trust company, John McGregor, and Daniel M. Lyon his plan, as follows: Defendant proposed that the said trust company should loan to the defendant a further sum of five thousand dollars for the sole and only purpose of purchasing $13,000 of Rockland Central R. R. bonds and $7,000 of Ridgefield Park railroad bonds, defendant thereupon to renew the whole of the said discharged indebtedness of thirty thousand dollars and to become liable for the said five thousand dollars, the said company agreeing to make said ad-
50 vance and, if this defendant was not able to do it, pay the necessary assessment of three per cent. on the said Ridgefield Park and Rockland Central securities which had by consolidation become securities of the Jersy City and Albany Railroad Company to enable that company to be reorganized and to obtain thereon the new securities of said reorganized company, this assessment to be paid by said trust company and charged finally to the defendant on account; the said company also to proceed and take action for the collection of said claims against Allen, Stephens & Company, George Opdyke and Company, and the New York and Oswego Midland Railroad Company, and also of the claim for four thousand shares of the capital stock of the New York and Oswego Midland Railroad Company, crediting defendant with all receipts and charging him with expenses, the defendant to give his time, services, and knowledge in that behalf free of charge. It was a part of the plan of the reorganization of the Jersey City and Albany Railroad Company that the old securities in which the defendant proposed such investment should be subject to such assessment, and that on the reorganization new first-mortgage bonds of the reorganized company should be given in exchange for said old first-mortgage bonds of the same amount, which would be of great value as compared with the price for which the old bonds could be bought; and it was further understood and agreed between said trust company and the defendant that said notes should be renewed from time to time,

and that said company should look to realizing from said collaterals for their payment, and also to such small payments as he
51 might be able from time to time to make.

18. That the said American Trust Company, by its officers as aforesaid, accepted the said proposal of the defendant and agreed to all the terms aforesaid. Thereupon the said $5,000 was, on the 24th day of February, 1876, advanced by the said American Trust Company for the purpose of purchasing said $13,000 of Rockland Central Railroad Company first-mortgage bonds and $7,000 of Ridgefield Park R. R. Co. first-mortgage bonds. The said securities consisted in part of bonds of the Rockland Central Railroad Company and the bonds of the Ridgefield Park Railroad Company, which had long before been consolidated with the Jersey City and Albany Railroad Company, and were first-mortgage bonds and were to be entitled on the plan of reorganization to first-mortgage bonds of the reorganized company in exchange therefor. Thereupon the defendant with the said $5,000 purchased thirteen first-mortgage bonds, of the par value of $1,000 each, of the Rockland Central Railroad Company; four first-mortgage bonds, of the par value of 1,000 each, of the Ridgefield Park Railroad Company, and six of said last-mentioned bonds, of the par value of $500 each, and, in pursuance of the said contract above stated, delivered the said bonds to the said trust company to be held as further collateral on defendant's said indebtedness, said collateral to be made available and valuable through the due performance by the said trust company of the said contract above stated.

And thereupon the defendant, in pursuance of said agreement, renewed the said discharged indebtedness of thirty thousand dollars by making and delivering to the said trust
52 company certain promissory notes in writing, whereby he promised to pay to the said trust company altogether the sum of about $——, the same being the amount of *of* the said $30,000 indebtedness, with interest to that date at twelve per cent., and the said defendant further gave his note for the said $5,000 advanced. Said notes for the renewal of said old discharged indebtedness and for said new loan were made payable by their terms in a few months after date, and have been from time to time thereafter, as they fell due, renewed by the defendant giving new notes for the amounts thereby secured, with interest, and said renewal notes have themselves been renewed, such renewals extending from time to time the payment of the sum, with interest, secured by the original notes down to shortly before the time of the institution in the supreme court of New Jersey of the action mentioned in the complaint herein.

19. A part of the contract aforesaid was reduced to writing by an informal paper, which stated the entire debt as $39,631.29, the giving of five notes therefor, and then declared said trust company held for this defendant the said claims against Allen, Stephens & Co., George Opdyke & Co., and the New York and Oswego Midland Railroad Company, as also a claim for four thousand shares of stock of the said company, together with the aforesaid 49 bonds of the said company'-

Western extension and the said 13 bonds of the Rockland Central Railroad Company and said seven bonds of the Ridgefield Park Railroad Company. It then declared that the proceeds arising from the sale of said securities and received from said claims were to
53 be applied to pay off said notes and interest and the remainder to this defendant, subject to the payment of monies expended by said trust company in prosecuting claims or selling the securities.

20. Thereafter the said trust company or said receiver prosecuted said claim against Allen, Stephens & Co. to a judgment for about $25,000, the recovery of which cost said company $4,329.24, as alleged by the said receiver, which has been charged to said defendant, but on information and belief the said receiver has received thereon about $6,250 instead of $5,000, as credited in the complaint, and defendant contributed his time for about two months and spent what money he could raise, viz., $500, in assisting in the obtaining of said judgment.

21. The defendant further alleges that in respect to the notes upon which he was sued in said Jersey action, and copies of which are set forth in the complaint herein, dated between October 29th, 1877, and March 2nd, 1878, a very grave error was made in the amount of the same and validity of some of them, a mistake which probably occurred by calculating renewals of said original notes of $15,000 each every four months from their due date in December, 1873, with interest at the rate of twelve per cent. per annum and compounding interest at that rate of interest every four months down to and including the making of the notes dated October 29th, 1877, and the notes dated between then and March 2, 1878, and, upon information and belief, by mistakes of calculation, as it
54 was agreed with the said trust company at the time of said renewal and loan that the whole account of the defendant with said trust company should be revised by defendant before final payment in full of said notes and errors and mistakes were to be corrected.

22. The defendant further alleges that the said notes, except the five for $200 each to John McGregor, mentioned in said complaint, never had any other or different consideration than that above stated.

23. Some time in the early part of the year 1879 the defendant was astonished by having a suit brought against him in the supreme court of the State of New Jersey in the action whereof a copy of the judgment-roll is set forth in the complaint. The defendant at once called upon said Wilkinson at his office, at Newark, New Jersey, and stated his surprise at such action being taken against him, also stating that he had a defense or defences to such action and would contest the same to the last dollar he possessed. Upon information and belief, said Wilkinson then falsely and deceitfully and with intent to defraud this defendant, upon knowledge, stated and represented as follows: That he, the said Wilkinson, had been advised by his counsel that he must, as receiver, for his own protection put all outstanding claims of said trust company in the forms of judg-

ments. Defendant stated he could not afford to have any such judgment taken against him, and that anyhow the amount was entirely too great. Said Wilkinson then stated to defendant
55 that if he, defendant, defended said action a great deal of evidence would have to be taken, and it would impose large expense on both parties that might be saved by arranging the matter between themselves; that he, Wilkinson, had the accounts of the defendant with the trust company under said contract, but his other pressing business prevented him from going over said accounts with the defendant; that he, Wilkinson, was only a receiver and had no personal profit to gain in the matter, and that if defendant would agree not to defend said action, but would allow judgment to be taken by default, he, the said Wilkinson, would not enforce said judgment or issue execution until he, the said Wilkinson, and the defendant had time to go over the said accounts and adjust the matter in dispute and ascertain the amount fairly and equitably due on said notes. To this proposition the defendant consented, and, relying solely upon said fraudulent representations, promises, and agreements, allowed the said judgment to be taken by default.

24. That the first day of July, 1879, was the last day on which the said assessment of three per cent. on said old securities of the Jersey City and Albany Railroad Company, amounting to $600, fell due and could be paid. On such payment the holders of said old securities were entitled to the new securities of the reorganized company, viz., the same amount in the first-mortgage bonds of said new company at par, which new securities were contemplated to be worth seventy-five cents on the dollar and turned out to be worth
56 as much and more, viz., par; that on January 8th, 1879, the plaintiff was appointed receiver of the said American Trust Company of New Jersey, and thereafter and after the defendant had consented, relying upon the said representations and statements of the plaintiff, the said judgment should be entered by default, but in due time before said last day to pay on said securities said assessment, the defendant duly notified the plaintiff of the last day to pay said assessment, and informed him that he, the defendant, was unable to and could not pay the same, and duly requested said plaintiff to pay the said assessment according to the promises of said trust company in said agreement; that defendant has duly performed all the conditions and promises of the contract above stated by him to be performed, but the said trust company and said receiver have wrongfully refused, neglected, and omitted to perform their portion of the same; that said receiver wrongfully refused to carry out said contract and pay said assessment, and this defendant was unable to do so; that said last day for said payment of said assessment elapsed and said assessment was not paid; that by reason of said gross negligence and said breach of said agreement by said company and said receiver and failure to pay said assessment according to their agreement on said 13 bonds of the said Rockland Central and 10 bonds of the Ridgefield Park railroad companies, the same were wiped out by said reorganization proceeding and became utterly valueless;

that, under the terms of said reorganization, upon payment of the said $600 assessment on said bonds the holders of the same
57 were entitled in exchange therefor to receive 20 $1,000 each par-value first-mortgage bonds of the reorganized railroad called the Jersey City and Albany Railroad Company of the States of New York and New Jersey and to a return of said $600 assessment in bonds of said company, which in a reasonable time thereafter were worth and sold in the market for par; upon information and belief, that said 20 first-mortgage bonds of $1,000 each, par value, of said reorganized railroad were, within a reasonable time and on the said 1st day of July, 1879, worth and sold in the market for seventy-five cents on the dollar, and were, within a reasonable time thereafter and on or about the 1st day of July, 1880, worth and sold in the market at par; that the said trust company did not merely contract with this defendant to pay $600, but to do more—to buy for him the said new securities, and the defendant is at least entitled to the said new securities or the value thereof to be credited on said judgment, and the defendant further says that almost the sole inducement to the defendant in renewing said discharged indebtedness and borrowing said $5,000 was the promise and engagement of the trust company to make available and valuable by paying said assessment the said securities bought for said $5,000, and, upon information and belief, the failure of said company and said receiver so to do has produced a failure of the consideration of said notes and judgment.

Defendant further alleges that by reason of the said negligence and wrongful acts of the plaintiff in the premises the plaintiff has converted said bonds to his own use, and the defendant has been damaged to the extent of twenty thousand dollars, and claims
58 the same, with interest from the 1st day of July, 1880, as a credit on said judgment under any by virtue of said contract.

25. On information and belief, that on the 16th day of February, 1880, the plaintiff, without any notice to this defendant, sold the said 49 bonds of the $1,000 each of the New York and Oswego Midland Railroad Company and realized therefor only the sum of $4,532.50, whereas if this defendant had received notice of such sale or had been consulted on the said matter the said receiver could, through defendant's instrumentality, have received therefor fifteen per cent. of their par value, or $7,350. Said bonds were at the time of such sale worth the said sum of $7,350, and according to memory they were sold without notice to the defendant, and the said company and said receiver, being not merely pledgees but also trustees for this defendant, were bound to give notice to defendant and consult him, and to realize the full value of said bonds, and, upon information and belief, are chargeable with the said full value, with interest from said date, as a credit on said judgment.

26. That the claim of the defendant against the said George Opdyke & Company held by the said trust company and the said receiver under said original arrangement with said trust company was a claim for the sum of $600,000 *dollars*; that at the time the defendant bought said claim for the trust company and thereafter on the

several and many distinct occasions the defendant urged and repeatedly requested the said trust company and thereafter the
59 said receiver to perform its part of said contract and prosecute said claim, offering and tendering defendant's services therefor, or else that they would reassign said claim to defendant so that he might make it available, but said trust company or said receiver have wrongfully neglected or refused to do either; that, as defendant was informed by his counsel and verily believes, said claim was a good and valid cause of action, there being no valid defence thereto, and alleges, on information and belief, that at the times of the requests herein stated to prosecute the same the said George Opdyke & Co. were perfectly solvent and able to pay upon the said claim, and that a considerable sum of money could have been realized out of said assett had said claim been pushed not less than 12½ per cent. of the whole debt.

That the said trust company did not merely contract with the defendant to pay the price of said claim and then do no more in the premises, but agreed, in consideration of said renewals and the services of defendant in that behalf, to press said claim and carry the same to suit, judgment, and execution, and pay necessary expenses so that something might be realized on said asset; that defendant has duly performed all the conditions to be performed on his part in said contract, and has often offered and tendered his services, and has requested said receiver to proceed to enforce the said claim by suit, but the said receiver has wrongfully neglected and refused so to do; upon information and belief, that said claim has become valueless since said neglect and refusal to prosecute by the running of the statute of limitations and the insolvency
60 of said Opdyke & Co.; and this defendant alleges on information and belief that by the refusal and neglect of said company and said receiver to prosecute said suit at the times when requested according to their said agreement the defendant has been damaged and suffered loss to the extent of not less that 12½ per cent. on the amount of said claim, or, say, seventy-five thousand dollars, which amount, less, say, five thousand dollars, the probable expense of prosecuting the said claim, should be credited on said judgment; and defendant further says upon information and belief that by reason of said negligence and wrongful acts of the plaintiff in the premises the plaintiff has converted said claim to his own use and defendant has been damaged to the amount aforesaid, with interest from, on, or about the 1st day of July, 1879.

27. That the claim of the defendant against the New York and Oswego Midland Railroad Company was a claim arising on contract out of work, labor, and services performed for said company for four hundred thousand dollars, at par of the common stock of said company; that said claim was held by said trust company pursuant to the said contract of renewal of said debt; that on several and many distinct occasions before the date hereinafter named the defendant requested and urged the said trust company, and thereafter said receiver, to prosecute said claim so as to realize upon it, offering and tendering defendant's services therefor, or that they would

reassign said claim to defendant so that he might make it available, but said trust company and said receiver neglected or refused to do either; that, as defendant was informed by his counsel, and
61 verily believes, said claim was a good and valid cause of action, there being no defence thereto, and alleges that within a reasonable time after said requests to prosecute and between the 1st day of February & May, 1880, the said stock was selling at six dollars per share; that the said trust company did not merely contract with defendant to pay the price of said claim and then do no more in the premises, but agreed, in consideration of said renewals and the services of defendant in that behalf, to press said claim to suit, judgment, and execution, and pay necessary expenses, so that something might be realized on said asset-; that defendant has duly performed all the conditions to be performed on his part in said contract and has requested said receiver to proceed to enforce said claim by suit, but the said receiver has wrongfully neglected and refused so to do; upon information and belief, that said claim has become valu-less through the running against it of the statute of limitation and the insolvency of said company, and that by reason of said wrongful refusal and neglect to perform said contract on the part of said trust company and receiver, — has converted the said claim to their own use and the defendant has suffered damage to the amount of 24,000 dollars, and the said sum, with interest from the 1st day of February, 1880, should be credited upon said judgment.

28. That on several occasions within two years after such judgment by default was entered the defendant requested the said Wilkinson to go over with him the said accounts and adjust the same, but the said Wilkinson each time put off this defendant with the excuse that he was too busy to then attend to it, but
62 would do so later.

29. Thereafter the said Wilkinson, in fraud of the rights of this defendant, issued execution on said judgment and had it returned unsatisfied and began suit by creditor's bill in the court of chancery of New Jersey against this defendant, his wife, and several others to reach certain property alleged to be held in fraudulent trust for the defendant. Thereupon such proceedings were had that the said bill was dismissed on the merits as to the defendant Ann Louisa Culver, defendant's wife, and J. Fitch Mallory, the trustee, as to all the property mentioned, except a house in 62nd street, New York, and as to that property was dismissed without prejudice to a new bill as to said house in 62nd street, New York city; and the said bill is still pending in said court between this defendant and the said Wilkinson.

30. That in consequence of the pendency of said creditor's bill and the large amount of litigation, expense, and loss of time it entailed on the defendant, and the fact that the defendant was advised by his counsel that under the laws of the State of New Jersey he could, at the hearing of said suit, show the fraud and covin that had been practiced upon him by the said Wilkinson in attempting to enforce the said judgment and thereby show the invalidity of

said judgment, the defendant did not take any further steps to have the said judgment set aside for fraud and covin than were involved in said defense to said creditor's bill.

63 31. That the said judgment so taken by default is the judgment a copy of the roll of which is set forth in the complaint; and said attempt to enforce said judgment is a fraud upon the rights of this defendant and in violation of the said agreement, and this defendant alleges, upon information and belief, that under the laws of the State of New Jersey as declared by the courts of that State the matters and facts above stated as a foundation of the charge of fraud and covin herein made as having been perpetrated by the plaintiff in attempting to enforce said judgment obtained by default would be sufficient to cause a court of equity to enjoin the defendant from enforcing said judgment in said State of New Jersey.

32. Defendant further alleges, upon information and belief, that under the laws of the State of New Jersey, where said judgment was obtained, the matters and facts above pleaded as constituting a defense of payment to the above judgment would be available and valid as a plea or answer of payment in any action brought therein on any "contract not under seal" (New Jersey Revision, 1875, p. 868) or on said judgment.

33. For a further, separate, and complete defence and by way of counter-claim the defendant repeats each and every allegation contained in the first 32 paragraphs herein and prays they may be made and taken as a part hereof.

34. Alleges that the counter-claim arises out of the cause of action stated in the complaint.

64 35. Upon information and belief that by reason of the matters and facts above stated the plaintiff is indebted to the defendant in the sum of seventy-three thousand three hundred and thirty-six and $\frac{67}{100}$ dollars.

Wherefore the defendant prays judgment that the complaint herein be dismissed, and that the defendant herein have judgment against the plaintiff for the sum of seventy-three thousand three hundred and thirty-six and $\frac{67}{100}$ dollars, with interest, together with the costs of this action.

R. FLOYD CLARKE,
Defendant's Attorney, 146 *Broadway, New York.*

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Delos E. Culver, being duly sworn, deposes and says: I am the defendant above named. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

DELOS E. CULVER.

Sworn to before me this 2nd day of February, 1886.

JNO. S. ROSSELL,
[NOTARIAL SEAL.] *Notary Public, Kings Co.*

Certy. filed in N. Y. Co.

65 (Endorsed:) United States circuit court for the southern district of New York. George Wilkinson, receiver, etc., plaintiff, *vs.* Delos E. Culver, defendant. Answer. (Copy.) To Edgar P. Hill, Esq., pl'ff's att'y, 200 Broadway, — city. R. Floyd Clarke, attorney for defendant, 146 Broadway, New York, N. Y.

66 United States Circuit Court, Southern District of New York.

GEORGE WILKINSON, Receiver, &c.,
against
DELOS E. CULVER.

George Wilkinson, the plaintiff in this action, by Edgar P. Hill, his attorney, for a reply to the answer of the defendant herein, respectfully shows to this honorable court that as to each and every allegation contained in said answer which tends to set up or establish a set-off or counter-claim in favor of the defendant and against the plaintiff he denies the same.

EDGAR P. HILL,
Plaintiff's Attorney, 200 Broadway, New York City.

STATE OF NEW YORK,
City and County of New York, } *ss.:*

Edgar P. Hill, being duly sworn, says that he is the attorney for the plaintiff in this action; that he has read the foregoing reply to the answer of the defendant in this action, and knows the contents thereof, and that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason the verification is not made by
67 said plaintiff is that he is not within the county of New York, which is the county where deponent resides, and that this deponent's knowledge is derived from the possession of the exemplified copy of the judgment on which this action is brought, and the grounds of his belief are information received from the letters of the plaintiff to this deponent and from conversations had with said plaintiff in regard to the subject-matter of this action.

EDGAR P. HILL.

Subscribed & sworn to before me this 23rd day of February, 1886.
JOHN R. MANLEY,
Notary Public (185), *New York Co.*

(Endorsed:) U. S. circuit court, southern district of New York. George Wilkinson, receiver, &c., against Delos E. Culver. Reply. Edgar P. Hill, plaintiff's attorney, 200 Broadway, New York city. Due and timely service of a copy of the within reply is hereby admitted this 23rd day of Feb., 1886. R. Floyd Clarke, defendant's attorney. U. S. circuit court. Filed Mar. 3, 1886. Timothy Griffith, clerk.

68 United States Circuit Court, Southern District of New York.

GEORGE WILKINSON, Receiver, &c.,
against
DELOS E. CULVER. } Notice of Trial.

Please to take notice that the issue of fact in this action will be brought to trial and an inquest taken therein at a stated term of this court appointed to be held in and for the southern district of New York, at the court-rooms of said court, in the post-office building in the city of New York, on the first Monday of April, 1886, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Yours, &c., EDGAR P. HILL,
Plaintiff's Attorney, 200 Broadway, New York.

Dated Feb. 24, 1886.

To R. Floyd Clarke, Esq., attorney for defendant, 146 Broadway, New York city.

(Endorsed:) U. S. circuit court, southern district of New York. George Wilkinson, receiver, &c., against Delos E. Culver. Notice of trial. Edgar P. Hill, plaintiff's attorney, 200 Broadway, New York. Service of a copy of the within motion of trial is hereby admitted this 2nd day of March, 1886. R. Floyd Clarke, defendant's attorney. U. S. circuit court. Filed Mar. 3, 1886. Timothy Griffith, clerk.

69 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the ninth day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Nathaniel Shipman, judge.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
v.
DELOS E. CULVER.

Now comes the plaintiff, by E. P. Hill, Esq., his attorney, and moves the trial of this cause; likewise comes the defendant, by R. F. Clarke, Esq., his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel, on Friday, Nov. 11, 1887, the court directs the jury to find a verdict for the plaintiff in the amount of $76,659.96. Thereupon the jury render a verdict whereby they find for the plaintiff in the amount of $76,659.96.

TIMOTHY GRIFFITH, *Clerk.*

70 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the court-rooms, in the city of New York, on Wed-

nesday, the 9th day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Nathaniel Shipman, judge.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
vs.
DELOS E. CULVER.

Judgment of the 11th Day of November, 1887.

The issues in this action having been brought on for trial before the Honorable Nathaniel Shipman, judge, and a jury, at a stated term of said court in and for said district, at the court-rooms, in the city of New York, on the ninth day of November, A. D. 1887, and the issues having been tried, and a verdict for the plaintiff having been duly rendered by direction of the court on the eleventh day of November, 1887, for the sum of seventy-six thousand six hundred and fifty-nine and $\frac{96}{100}$ dollars (76,659.96), upon which the court directed judgment to be entered for the plaintiff:

Now, on motion of Edgar P. Hill, attorney for said plaintiff, it is ordered and adjudged that said George Wilkinson, receiver
71 of the American Trust Company of New Jersey, recover of said Delos E. Culver, the defendant herein, the sum of seventy-six thousand six hundred and fifty-nine and $\frac{96}{100}$ dollars damages found by said jury, with thirty-eight $\frac{42}{100}$ dollars costs and disbursements, amounting in all to the sum seventy-six thousand six hundred ninety-eight and $\frac{38}{100}$ dollars ($76,698.38), and that the said plaintiff have execution therefor.

Judg't signed this 23 day of November, 1887.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) U. S. circuit court. Filed Nov. 23, 1887. Timothy Griffith, clerk.

72 *Bill of Exceptions.*

United States Circuit Court for the Southern District of New York, October Term, 1887.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Plaintiff,
against
DELOS E. CULVER, Defendant.

Be it remembered that the above-entitled cause came on to be heard at the October term, 1887, of the said court for the trial of jury causes, held at the city of New York, in the court-room, in the post-office building, in the City Hall park, in said city, on a regular day of said term, to wit, the 9th day of November, 1887, before his honor Nathaniel Shipman, sitting as judge of the said court,

at which time and place the parties to the said cause duly appeared, by their counsel, as follows:

Mr. Courtlandt Parker appeared as counsel for George Wilkinson, receiver, etc., plaintiff, and Mr. R. Floyd Clarke appeared as counsel for Delos E. Culver defendant.

And thereupon counsel for plaintiff asked the court to render judgment upon said complaint for the amount of *of* principal
73 and interest of the judgment of the supreme court of New Jersey in said complaint mentioned, and the recovery of which the answer of the defendant admitted, and to strike out all of said answer except said admission as setting up irrelevant and inadmissible matter.

Which request the court, after argument, refused; to which refusal counsel for the plaintiff excepted, and such exception was thereupon sealed; and thereupon a jury of twelve good men, and true to try the said issues, was duly drawn from the panel and duly empanelled, sworn, and accepted by the parties in said cause.

And thereupon the defendant, Delos E. Culver, through his counsel as aforesaid, claimed the right to open and close said case to the jury under the pleadings; whereupon his honor ruled that the right to open and close lay with the plaintiff, George Wilkinson, receiver as aforesaid.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted and proposed said exception to the opinion of the judge and requested the said judge to put his signature and seal to this bill of exceptions, containing said several matters produced and given in evidence for the party objecting as aforesaid, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of said counsel for the party objecting, did sign and allow this exception by signing and allowing this bill of exceptions, containing the above and the other exceptions hereinafter stated, as appears at the end hereof, pursuant to the statute in such case made and provided, which is accordingly done in term time at the
74 date hereinafter mentioned.

The said plaintiff thereupon put an exemplified copy of the judgment obtained in New Jersey in evidence, which was in the words and figures of the copy set forth in the complaint in the above-entitled action, a copy of which complaint is contained in the transcript of the record annexed hereto and which is prayed to be made and taken as a part hereof by reference.

The plaintiff also put in evidence the admissions of defendant's answer and rested.

Counsel for the defendant, Delos E. Culver, then stated the case for the defendant to the court and jury, and the following proceedings were had:

DELOS E. CULVER, a witness for the defendant, was then introduced and testified as follows:

That he was the defendant in this action and knew the plaintiff and the American Trust Company.

That the officers of the American Trust Company, with whom he had dealings with relation to the transactions involved in this suit, were Mr. William A. Whitehead, Mr. John McGregor, and Mr. D. M. Lyon.

The witness then identified two (2) promissory notes, which were put in evidence as Defendant's Exhibits Numbers Fifteen (15) and Sixteen (16), of which the following are true copies:

$15,000.00. NEWARK, *Aug. 2nd*, 1873.

Four months after date I promise to pay *the* The American Trust Company of New Jersey, at the office of said company, in the city of Newark, fifteen thousand dollars, for value received, with interest at the rate of — per cent. per annum, having pledged to said
75 company as security (with authority to sell the same on non-performance of this promise in such manner as they in their discretion may deem proper, without notice, either at the New York brokers' board or at a public or private sale, and to apply the proceeds thereon) twenty-four bonds New York & Oswego Midland R. R. Co., 1st m'tg'e, Western Ex., amounting to ($24,000), numbered 1321 @ 1334 and 1823 @ 1832, for $1,000 each.

In case of depreciation in the market value of said security hereby pledged or which may hereafter be pledged for this loan a payment is to be made on account, so that the said market value shall always be at least — per cent. more than the amount unpaid of this note.

In case of failure to do so this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the company may immediately reimburse itself by sale of the security.

L. 81, Dev. 5.

D. E. CULVER.

$15,000.00. NEWARK, *Aug. 12th*, 1873.

Four months after date I promise to pay to The American Trust Company of New Jersey, at the office of said company, in the city of Newark, fifteen thousand dollars, for value received, with interest at the rate of — per cent. per annum, having pledged to the said company as security (with authority to sell the same on non-performance of this promise in such manner as they in their discretion may deem proper, without notice, either at the New York brokers' board or at a public or private sale, and to apply the proceeds
76 thereon) twenty-five thousand dollars at par in bonds, 1st mortgage, N. Y. & O. Midland R. R. Co., on the Western Extension.

In case of depreciation in the market value of the security hereby pledged or which may hereafter be pledged for this loan a payment is to be made on account, so that the said market value shall always be at least — per cent. more than the amount unpaid of this note.

In case of failure to do so this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary

notwithstanding, and the company may immediately reimburse itself by sale of the security.

D. E. CULVER.

L. 83. Du. 15.
1878–1894, 2000 @ 2008.

It was proved that Delos E. Culver was proceeded against in involuntary bankruptcy by petition filed by a creditor Hatch on the 23rd day of September, 1873, in the United States district court for the district of New Jersey, and that thereupon such proceedings were duly had therein that Washington B. Williams was appointed receiver of said Delos E. Culver, in bankruptcy, and thereafter the said Delos E. Culver was duly discharged in bankruptcy from all debts and claims by the bankruptcy act made provable against his estate and which existed on the 23rd day of September, 1873, on which day the petition for adjudication was filed against him, the said discharge being dated the first day of December, 1874, and obtained from the said district court of the United States for the district of New Jersey, a copy of which is annexed and marked Defendant's Exhibit No. 5.

77 The defendant, DELOS E. CULVER, further testified as follows:

Q. Will you look at the document now shown you and state what it is?

A. It is a contract between myself and the American Trust Company, signed by W. A. Whitehead, treasurer, and witnessed by John McGregor, dated February 24, 1876, at Newark, New Jersey. There is also a memorandum written on the back of it in pencil.

Mr. CLARKE: I offer that memorandum contract in evidence.

In reply to the counsel for plaintiff—

Witness said the memorandum is no part of the contract.

The contract is read in evidence, and marked Defendant's Exhibit No. 17, of which the following is a true copy:

"Whereas Delos E. Culver, of Jersey City, New Jersey, is indebted unto the American Trust Company of Newark, N. J., in the sum of thirty-nine thousand six hundred and thirty-one and $\frac{29}{100}$ dollars, $39,631.29, for which indebtedness he has given said company his five certain notes or obligations, dated this day, one, $4,631.29, due June 27, '76; one, $8,750, due Aug. 27th, '76; one, $8,750, due Nov. 27th, '76; one, $8,750, due Feb'y 27th, '77, and one, $8,750, due May 27th, '77, all with interest from date.

Now, therefore, the said American Trust Company hereby declares that it holds for the benefit of said Delos E. Culver certain choses in action, stock, and bonds, more particularly described as follows:

Chose in action against Allen, Stevens & Co.

Chose in action against Geo. Opdyke & Co. & N. Y. & O. M. R. R. Co.

78 Claim for 4,000 shares of the capital stock N. Y. & O. M. R. R. Co.

49 bonds of the N. Y. — O. Midland R. R. Co., western extension.
13 bonds of the Rockland Central R. R. Co.
7 bonds of the Ridgefield Park R. R. Co.

The proceeds arising from the sale of said securities & recovered from said choses in action are to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E. Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.

In witness whereof The American Trust Company has caused its treasurer to set his hand this 24th day of February, 1876, at Newark, N. J.

W. A. WHITEHEAD, *Treasurer.*

Witness:
JOHN McGREGOR."

Q. Will you now state whether that memorandum just read in evidence embodies the whole of the contract made at the time between you and the trust company or not; whether there was any other agreement besides that as to what they were going to do?

A. I understood that there were other things that they were going to do, in the conversations and agreements.

By Mr. PARKER:

Q. Expressed in writing?

A. I merely made a memorandum of it going home in the cars—on the back of it—according to my understanding of it.

By Mr. CLARKE:

79 Q. The question is, is that memorandum (Exhibit No 17) a complete memorandum or contract as made at the time, or were there other things which the company were to do which stood in parol outside of the paper?

A. Yes, sir.

Q. That contract, aside from those other things, is a statement of the transactions, is it not?

A. Yes, sir.

Mr. PARKER: I object to any other things going in than as stated in the contract.

Mr. CLARKE: I submit that where the written document does not show the entire transaction we are entitled to show what the oral agreements were. The document being silent on certain parts of the agreement, we are entitled to show them.

The COURT: You can show what the circumstances were surrounding the execution of this document.

Q. State the circumstances under which that document was drawn, where it was drawn, and when, and what was the occasion.

A. I drew it in their office, in Newark, after several meetings, with one or more of the gentlemen I have named and having a very full understanding of what I meant to do for my part and

what they were to do for their part. I drew it myself and drew it in a hurry.

Q. State the facts as to the agreement and how this document was reduced to writing and all the circumstances of it.

A. These claims were to be prosecuted by them to judgment.

80 Mr. Parker objected.

The COURT: I will not admit testimony of any oral communication in regard to what was to be done by the trust company with this collateral security. If you have a witness to prove an independent agreement upon the part of the trust company involving the expenditure of money or the performance of things by them in regard to it, then the rule in regard to the altering, adding to, or varying a written contract is a different thing.

Q. State the facts how the agreement was entered into and where and when and with whom.

A. Entered into after negotiations at the office of the company, in Newark, and the consideration for renewing my indebtedness to them as to which I had received my discharge in bankruptcy was that——

Q. State what the trust company's officers agreed to do with relation to these claims in respect to the prosecution of the claims against the New York and Oswego Midland and against George Opdyke.

Mr. PARKER: I object to that as irrelevant and incompetent, not as leading.

The COURT: If the answer has relation to anything that was agreed to be done contemporaneously with the signing of the agreement or before the signing of the agreement it is excluded.

Mr. CLARKE: To that ruling of the court the defendant excepts.

Q. Does the answer that you would give to my question relate to anything that occurred at or before?

A. And after it; at that time and before and afterwards;
81 it was all a part. It is intermingled in such a way that I don't see how I can separate it.

The COURT: That is excluded.

Mr. CLARKE: The defendant excepts as to the ruling of the court.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether at the time this contract was made, February 24th, 1876, the trust company agreed to prosecute the claim against George Opdyke and the claim against the New York and Oswego Midland.

Mr. PARKER: Objected to.

The COURT: That is excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether at the time of the execution of this contract the trust company agreed that the 13 bonds of the Rockland Central and the 7 bonds of the Ridgefield Park and the 49 bonds of the New York and Oswego Midland should either be sold or, according as the interests of the parties might dictate, that in reorganization proceedings of the respective roads then pending the trust company were to advance the assessments needed to obtain for those securities the new securities of the reorganized companies in exchange therefor when the plans for reorganization were completed.

Mr. PARKER: That is objected to.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

82 Q. State whether those reorganization plans were carried out in relation to the Rockland Central and Ridgefield Park railroads, and whether the bonds of the Rockland Central and Ridgefield Park could have been exchanged at par for the income bonds at par of the Jersey City and Albany railway of the State of New York and New Jersey at par, which was the reorganized company formed by the foreclosure of the bonds of the three roads, namely, the Rockland Central, the Ridgefield Park, and the Jersey City & Albany Railroad Company, and whether the assessment needed to enable those bonds to be so exchanged upon such reorganization was not, all together, the sum of about $600; also whether that $600 was entitled, on the reorganization, to the first-mortgage bonds of the Jersey City and Albany railway of New York and New Jersey; and also state whether the income bonds of the Jersey City and Albany railroad were not, immediately after the reorganization, of the value of from 60 to 70 cents on the dollar, and whether the value of the first-mortgage bonds covering this six-hundred-dollar assessment and received in exchange therefor were not, immediately after the reorganization, of the value of par.

Mr. PARKER: Objected to because it is irrelevant.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether the reorganization proceeding in the Rockland Central and Ridgefield Park matters was completed, and whether, if the assessments had been paid, new bonds of the new com-
83 pany at par could have been obtained in exchange for the $20,000 of the Rockland Central and Ridgefield Park, and whether those bonds, upon the exchange, would have been worth 60 to 75 cents on the dollar.

Mr. PARKER: Objected to as irrelevant.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Mr. CLARKE: The defendant offers to prove that at the time of the agreement with the American Trust Company, on February 24th, 1876, the trust company verbally agreed to prosecute the claims against George Opdyke and against the New York, Oswego and Midland railroad and to advance the expenses of such prosecution, which should be a charge against the defendant and included in his principal debt.

The defendant further offers to prove that those claims were valid claims, and that if prosecuted judgment could have been obtained upon them.

He further offers to prove that it was not within the purview of the contract that the judgment against the New York and Oswego Midland should be collected by execution, the company at the time being insolvent, but that it should be used in the reorganization proceeding then pending or sold, as best might be to the interests of the parties, and that from the failure of the trust company to prosecute those claims he has been damaged to the extent of $150,000.00.

Mr. PARKER: Objected to as irrelevant.

The COURT: That is excluded.

To which ruling the defendant, Delos E. Culver, through
84 his counsel as aforesaid, then and there duly excepted.

The defendant also offers to prove that at the time of the contract, February 24, 1876, the trust company verbally agreed that in a reorganization proceeding then pending it would advance the assessments, amounting to about three per cent., upon the bonds of the Rockland Central and Ridgefield Park, needed to enable those bonds to be exchanged for first-mortgage income bonds of the new company; that such reorganization proceeding was completed, and that if the assessments had been paid 20,000 of the par value of the income bonds of the new company would have been obtained in exchange for the $20,000 of the Rockland Central and the Ridgefield Park Companies; that the defendant notified the trust company and its officers and requested them to pay the instalments in question, and that they neglected and refused to do so; that those income bonds immediately after reorganization were worth 75 cents on the dollar, and that the defendant has been damaged to the extent of $15,000, with interest from 1880, by the failure of the trust company to carry out this portion of the agreement.

Mr. PARKER: Objected to as irrelevant.

The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

The defendant also offers to prove that he repeatedly requested the trust company and the receiver to prosecute the claims against Opdyke and the New York and Oswego Midland, and that by the
85 running of the statute of limitations against the claim against Opdyke the same has become valueless, and by the foreclosure of the New York and Oswego Midland that claim has

become valueless, and that George Opdyke was, during the time when that claim could have been prosecuted against him, abundantly solvent and able to pay any damages up to the amount of $550,000 that might have been recovered against him.

Mr. PARKER: Objected to as irrelevant.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Mr. CLARKE: Now in order to show the construction placed by the parties upon this agreement I offer in evidence a letter from Mr. Whitehead.

Q. Will you look at the document now shown you and state what it is?

A. It is a letter in the handwriting of Mr. Whitehead, dated Newark, New Jersey, July 26th, 1877, and directed to me. The signature is admitted.

The letter is read in evidence, being a letter of Mr. Whitehead to the defendant Culver, dated July 26th, 1877, and it is marked Exhibit of Defendant No. 61*a*, and is as follows:

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley, sec'y.

The American Trust Company of New Jersey.

NEWARK, N. J., *July 26th*, 1877.

Mr. Delos E. Culver, Jersey City.

86 DEAR SIR: Your letter of yesterday's date, with note for $5,428.61, has been received and I enclose the old note cancelled.

Your obligations mature as follows:

Aug.	2	$4,829 15
"	25	5,331 29
Sep.	2	4,853 94
"	29	4,873 36
Oct.	3	4,885 23
Oct.	25	4,219 96
"	29	4,901 66
Nov.	28	5,428 61
Dec.	3	4,938 59
		$44,261 79

To which is to be added:

1876.			
		Cost of choses in action at sale	$9 00
Jan.	22.	Paid J. W. Culver for expenses	100 00
Mar.	25.	" do. "	325 74
May	16.	" G. R. Foster, ac. of bonds	245 00

1877.					
Mar.	19.	Paid Culver & Shoudy		100	
Feb'y	14.	"	do.	300	
Ap.	21.	"	do.	100	
					1,179 74
			Total		$45,441 53

(Continuation of Ex. 61*a*.)

The securities we hold are as follows:

D. E. Culver claim against Allen, Stephens & Company	$22,000
D. E. Culver claim on the N. Y. & O. Midland R. R.*y* Co. & George Opdyke for breach of contract	600,000
D. E. Culver's claim on the N. Y. & O. Midland R. R.*y* for work performed, etc.	400,000
87 49 bonds of the New York and Oswego extension bonds, $1,000 each	49,000
4 bonds of the Ridgefield Park R. R*y* Co., $1,000 each	4,000
6 bonds do. do. $500 each	3,000
13 bonds Rockland Central r'road, $1,000 each	13,000

(End of letter.)

Q. At the time this agreement of February 24, 1876, was entered into what were the relations between yourself and Mr. McGregor and Mr. Lyon and Mr. Whitehead, with whom the contract was made, were they friendly or otherwise?

A. Friendly.

Q. Did either of you ever consult an attorney as to whether you should draw up a contract covering the agreement?

A. I did not.

Q. Did either of them suggest such a thing?

A. No, sir.

Q. How long did it take you to draw this memorandum that you have put in evidence?

A. I guess about five minutes.

Q. And where was it done?

A. At their office in Newark at the time.

Q. At the time the contract was made?

A. Yes, sir.

Q. How long were you in their office altogether at the time?

A. According to my recollection, I should say about an hour.

Q. Did conversation precede the drawing of this instru-
88 ment?

A. It did.

Q. Was anything said after the instrument was drawn and signed?

A. I don't remember anything. I remember of making the memorandum on the agreement on going home.

Mr. CLARKE: I offer to prove that at the time this contract was entered into the trust company agreed to prosecute the claims against Opdyke and against the New York and Oswego Midland.

Admission of evidence objected to by plaintiff because it is irrelevant, and because it varies, adds to, alters, or contradicts the written instrument.

The COURT: That is excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

I now offer the same evidence in connection with the letter of July 27, 1877.

The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. Look at the letter now shown you and state whether you recognize the handwriting.

A. I recognize the handwriting of the signature, and I remember the letter and statement included with it dated August 28th, 1877, and it is directed to Delos E. Culver and signed by W. A. Whitehead, treasurer.

Mr. CLARKE: The two papers are offered in evidence in the same way.

89 The two papers were read and marked respectively Defendant's Exhibits 62*a* and 62*b*, of which the following are copies:

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley, sec'y.

The American Trust Company of New Jersey.

NEWARK, N. J., *August* 28, 1877.

Mr. Delos E. Culver, Jersey City.

DEAR SIR: Having paid to Mr. James W. Culver twenty-one hundred and fifty dollars on account of the expenses of the reference in case of Allen, Stephens & Co., I enclose to you a note covering that and previous payments as per statement herewith made up to this date, the total amount being $3,413.21. I have drawn the note at four months, with interest. Please sign and return it, and also the one sent to you under date of the 20th.

Very respectfully y'rs,

W. A. WHITEHEAD, *Treasurer.*

Ex. 62*b*.

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley, sec'y.

The American Trust Company of New Jersey.

NEWARK, N. J., *August 28th*, 1877.

Expenses to Date on Account of Claim of Delos E. Culver.

1876.			
Jan. 22.	Paid	J. W. Culver	$100 00
90			
		Interest, one yr. 7 mo. 6 d.	11 20
Mar. 25.	Paid	" do.	325 74
		Interest, one yr. 5 mo. 3 d.	32 50
Apr. 7.	"	for certain choses in action	9 00
		Interest, 1 yr. 4 mo. 21 d.	88
May 16.	"	on ac. bonds	245 00
		Interest, 1 yr. 3 mo. 12 d.	22 01
1877.			
Feb. 14.	"	Culver & Shoudy	300 00
		Interest, 6 mo. 14 d.	11 32
Mar. 19.	"	do.	100 00
		Interest, 5 mos. 9 d.	3 09
Apr. 21st.	"	do.	100 00
		Interest, 4 mos. 7 d.	2 47
Aug. 28.	"	James W. Culver	2,150 00
			$3,413 21

W. A. WHITEHEAD, *Treas.*

Mr. CLARKE: I offer in evidence a letter, dated March 27, 1877, to Delos E. Culver from Mr. W. A. Whitehead.

The letter is marked Defendant's Exhibit No. 63, and is as follows:

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
Nathaniel Niles, V.-pres't. James V. Bentley, sec'y.

The American Trust Company of New Jersey.

NEWARK, N. J., *March 27th*, 1877.

D. E. Culver, Esq., Jersey City.

DEAR SIR: You did not answer my inquiries in relation to the
*pre*centage asked for on the bonds of Mt. Ithaca, Auburn and
91 Western Railway Co. I have received another circular, which
I inclose. Be pleased to let us have your views on the subject. I fear it is throwing good money after bad to heed their request.

Very truly yours, W. A. WHITEHEAD, *Treas.*

The witness further testified that the $39,631.29, recited in the memorandum of February 24th, 1876, as the amount of the principal debt, for which five (5) notes were given, was made up of his indebtedness upon the two promissory notes for $15,000 each, with interest to February 24th, 1876, each above recited (Defendant's Exhibits 15 & 16), which had been discharged in bankruptcy under his discharge, Defendant's Exhibit No. 5, together with a loan of $5,000 made at the time, February 24th, 1876, with which defendant purchased and turned over on that day to American Trust Company the 13 bonds of the Rockland Central R. R. Company and the seven bonds of the Richfield Park R. R. Company recited as held in collateral by the American Trust Company in the memorandum of February 24th, 1876.

The defendant further testified as follows:

"I used all the money they gave me to buy these bonds. I gave five cents on the dollar, and the plan of reorganization was going on, and the idea that they would become available, and they did become available, and I bought them so as to increase my avails and proceeds out of this arrangement, and at once turned them over to the American Trust Company.

92 The Jersey City and Albany railroad was reorganized, and under the first arrangement the assessment upon the Richfield Park and Rockland Central bonds required, in order to entitle them to bonds of the new road under reorganization, was 1%, and after the time expired for letting them the company agreed that if the people came and paid 3% they would let them in down to the last moment when the company would get ready to wind up its affairs, and the stock and bonds of the new company together sold for 50 cents on the dollar, the income mortgage bonds being more valuable. The old bonds could have been exchanged for new down to the winter and spring of 1880.

The 13 bonds of the Rockland Central and the 7 bonds Richfield Park have never been sold."

The witness was then asked the following question:

Question. What was their value just after this contract was made, and what has been their value up to the time when the reorganization proceeding was completed?

Mr. PARKER: I object to that as irrelevant.

The COURT: For the present I exclude the testimony.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

It was further proved that the notes upon which the judgment sued upon in this action were obtained were, with the exception of five notes for $200 each, to the order of John McGregor, and endorsed by him without recourse, renewals of successive renewal notes made by Delos E. Culver to the American Trust Com-

93 pany on the surrender of the former note or renewal, and given from time to time from February 24th, 1876, to March 2nd, 1878, to the trust company, the consideration of the same being

the original five notes specified in memorandum of February 24th, 1876.

Mr. CLARKE:

Q. When that agreement of 1876 was made with the trust company, state what conversation you had with the officers of the company in relation to these collaterals, as to their nature, etc.

Mr. PARKER: On the date of that agreement?

Mr. CLARKE: Yes, sir; this is referred to to show the subject-matter of the contract and what the trust company knew about the collaterals.

A. My recollection is that I showed them my contracts, exhibiting them and explaining and making clear to them how I could recover judgments against the New York and Oswego Midland road certainly, and probably against George Opdyke as well—that is to say, I expected that Mr. Opdyke, being responsible, if we could recover the claim against him, it being a large amount of money, would take care of everything; we discussed also the way in which the securities of the Ridgefield Park and Rockland Central bonds and the bonds of the Western extension were to be made valuable. In reorganizations where that thing is always done a percentage is paid in new bonds or in new securities in exchange for old; and I know of the reorganization plans, and, if I recollect right, I knew about them in all three of those roads; therefore, my statement to th*me* explained exactly how these things would be valuable, both the judgments and the bonds.

94 Q. Now state whether anything was said between you as to the questions of your solvency or insolvency.

A. They knew that I was insolvent and hadn't any money.

Q. Have you been able yourself to pay any of the expenses upon these claims since that date?

A. No, sir; not that I remember.

Q. What was said between you as to what you should do about the evidence of these claims? Of course you were a principal witness.

A. I was to give my time for nothing, as much of it as was required, and if I could pay any of the expenses I was to pay them.

I gave my time, a large amount of it. I agreed to get testimony, get the papers, and to do the running backwards and forwards to the lawyers who were prosecuting the suits and bring all the contracts and all the papers and all the witnesses whose services were required or the use of which would be necessary to collect these judgments, and from time to time I did give so much of my time as was necessary and was not to make any charge for my personal expenses.

While this business was going on they were to have as much of my time and have it as fully as should be necessary.

Q. Will you state whether, in the prosecution of the claim against Allen, Stephens & Co., you gave your time and attention; and, if

so, about how much of your time and attention according to your contract with the company?

Mr. PARKER: I object to that.

The COURT: I exclude it.

95 To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether, after this contract was entered into, you offered your services in the prosecution of these claim- to the trust company.

A. I did.

Q. To whom?

A. To the officers of the company, Mr. Whitehead and Mr. McGregor, and their lawyers.

Q. When were these offers made?

A. Right along—all the while after this contract was made. I always held myself in readiness.

The witness further testified that the New York and Oswego Midland Railroad Company went into bankruptcy and a receiver was appointed in the fall of 1873, and that at the time of the memorandum made in 1876 it was still in the hands of the receiver, Abram S. Hewitt, and that before that date the plan for reorganization was pending, of the details of which he had knowledge; that such plans involved the foreclosure of the first mortgage and of the reorganization of the road, and that he stated the facts as to the condition of the road and the reorganization plan to the trust company's officers before the memorandum of February 24th, 1876, was entered into. The defendant then put in evidence a contract entitled Articles of agreement between Delos E. Culver, of Jersey City, party of the first part, and the New York and Oswego Midland Railroad Company, by their president, party of the 2nd part, which is summarized as follows:

96 Under said contract Culver, as party of the first part, agreed to construct and finish in a substantial and workmanlike manner all the grading, masonry, bridge-, fences, laying iron and ties, building depots, turn-tables, and water stations, and ballasting the road and furnishing all the iron, ties, lumber, joints, spikes, and all the other materials necessary to be used in the construction of that portion of the company's railroad lying between the village of Walton, in the county of Delaware, and the point near the west end of the Neversink tunnel, in the county of Sullivan, being a distance of about 73 miles, to be completed in accordance with the specification, plans, and under the direction of the engineer in charge of said work and subject to the approval of the president of the party of the second part. Upon the performance and fulfilment by the party of the first part the said New York and Oswego Midland R. R. Company, party of the second part, shall and will, for the doing and completing of the work and the furnishing all the materials as aforesaid, pay or cause to be paid to the said party of the first part, his heirs, executors, administrators,

or assigns, the just and full sum of three millions six hundred and seventy-six thousand six hundred dollars, $3,676,600, the same to be paid in the stock and bonds of said company and in town bonds in the manner and form and at the rates following—that is to say:

$1,460,000 in 1st-mortgage bonds of the N. Y. and O. M. R. R., at 96c.	$1,401,600
$1,625,000 in second-mortgage bonds of the N. Y. & O. M. R. R., at 80c.	1,300,000
100,000 in town bonds, at par	100,000
97 1,250,000 in N. Y. & O. M. R. R. stock, at 70 cents	875,000
	$3,676,600

It being, however, hereby mutually understood and agreed by the parties hereto that, in making up the monthly estimates for work and materials of the party of the first part for the months prior to the time when the engineer in charge of said work shall be able to ascertain approximately and with reasonable accuracy the whole amount of work to be done and materials to be furnished under this contract by said Culver, the amounts which he shall have paid or have become liable to pay for such work and materials during the times aforesaid shall be taken and estimated to be the just and true sums which he shall be entitled to receive from said company on such monthly estimates; and for such monthly estimates (for the months prior and up to the time aforesaid) the said party of the second part shall pay the said Culver in the aforesaid stock or bonds or either of them as they may elect (provided, however, that not more than one-third of the amount of any such estimate shall be paid in stock at any time), which said stock and bonds (so far as pertains to the payment of such monthly estimates as aforesaid) shall be estimated at the rates and prices following—that is to say:

First-mortgage bonds of said company at 90 cents; second-mortgage bonds of said company at 70 cents; stock of said company at 40 cents, and town bonds at par.

But whenever and as soon as the said engineer in charge
98 shall be able to ascertain approximately and with reasonable accuracy the total amount of work to be done and materials to be furnished under this contract, that then a schedule of prices shall be arranged and prepared by said engineer of the various items to be included in the monthly estimates thereafter to be made up at their fair proportionate relative values, taking into account the whole amount thereof and the whole sum to be paid therefor, and thereafter monthly estimates of the work done and materials furnished by the said party of the first part shall be made up on the basis of and in accordance with the schedule of prices so to be prepared as aforesaid, and from such time forward until the completion of the contract by said Culver payment of such monthly estimates shall be made by said company at and after the relative rates and prices for stock and bonds first in these articles of agree-

ment set forth; provided, however, that not more than one-third of the amount of any monthly estimate shall be paid in stock; and provided, further, that whenever and as soon as said railroad company shall, under the terms and provisions of the deed of trust given to secure their first-mortgage bonds, be permitted and entitled to make a further issue of such bonds, *and* that then and thereafter the payment of the monthly estimates of the said party of the first part shall be made to him by said company wholly in such first-mortgage bonds so long as the said company shall or may be entitled to issue the same.

It is further mutually understood and agreed that the monthly estimates for work done and materials furnished under this
99 contract shall be made up by the engineer in charge, and he shall submit the same to the president of said company for his approval, who shall upon such approval on or before the 15th day of each and every month cause to be paid the amounts thereof, less 10 % to be retained as security for the performance of this contract, unto the said party of the first part.

The contract then specifies the right of way and possible changes to be made, character of iron, bridges, and material — ballast furnished for railroad company, engineer in charge to be sole judge of quality of work, and closes as follows:

In testimony whereof the said party of the first part hath hereunto set his hand and seal, and the party of the second part hath caused these presents to be executed by its president and the corporate seal of the said company to be hereunto affixed, the day and year first in this indenture written.

DELOS E. CULVER. [SEAL.]

[Seal of the Company.]

NEW YORK AND OSWEGO MIDLAND RAILROAD COMPANY,
By D. C. LITTLEJOHN, *President.*

Signed, sealed, and delivered in presence of—
H. R. LOW.

The specifications are annexed to the contract. The defendant further put in evidence article 7 of the printed copy of the by-laws of the New York and Oswego Midland R. R. Company, in which it is stated the treasurer shall pay all bonds, coupons, dividends, notes, and acceptances due from the company on presentation of the proper voucher therefor. All other accounts or claims
100 against the company shall be paid upon the order of the president or in such manner as the board may from time to time direct; also article 5, section 1, which reads as follows:

The president shall be the chief executive officer and head of the company in all its operations.

The witness then further testified as follows:

Q. Will you state what you did in relation to completing the contract and earning the money under it?

A. I went on and completed that contract with the exception of about $70,000 worth of work. At the request of the company I then ceased working and settled the amount of the contract. The reason was at their request, because——

Mr. PARKER: I object to that as irrelevant.

Admitted.

Q. Will you proceed and tell us what occur-ed between yourself and Mr. Littlejohn and Mr. Opdyke in relation to the completion of this contract?

Mr. PARKER: Objected to as hearsay.

Admitted.

A. I became entitled under this contract to an estimate of $240,000 of first-mortgage bonds of this company, and I demanded them of the railroad company. I was met by the statement that, there being three trustees, Mr. Opdyke one and De Wolf, of Oswego, another and A. A. Low, of Brooklyn, another, Mr. Low declined on some technical ground to sign as trustee, and therefore they were unable to give me the bonds; but at a meeting held between Opdyke, Littlejohn, and myself I agreed that I would proceed with the work,
101 under the assurances of their lawyer and my own that probably it would not take long to compel this man to sign these bonds or else the court would appoint another man in his place to sign them, and I would get the bonds. Mr. Littlejohn and Mr. Opdyke both agreed that if I would not go on it would be very disastrous to themselves and everybody else, and that if I did go on the moment that the bonds were obtained they should be delivered over to me according to the terms of my contract. I went on. The court compelled the trustee to sign. He did sign, and I held an order from the railroad company to get the bonds, and I went to Opdyke under that order to get them. Mr. Opdyke told me that I could not have the bonds; that he, after they were signed by the trustee, had delivered those bonds to George Opdyke & Co. under some arrangement by which they were to hold all the securities coming into the hands of George Opdyke & Co. as collateral to acceptances and debts of the railroad company, most of which, by the way, in this case accrued after this agreement was made that I should have the bonds whenever they were signed. That is my claim.

Q. Will you now state whether Mr. Opdyke stated to you what he received for the bonds?

A. Yes; he said that the bonds had been disposed of by him to George Opdyke & Co. and to other people to net the New York and Oswego Midland 92 or 92½ on the dollar, and that it had been credited to the railroad company.

Q. Will you state now whether this order was in writing from Littlejohn that was given to you for those bonds?

A. The order was in writing. It was a letter. There were two letters, one first, another one, and those letters I exhibited to
102 Mr. Opdyke, and I received the same answer in both cases.

Q. Were those letters signed by Mr. Littlejohn?

A. Yes, sir.

Q. Did those letters request Opdyke to deliver the bonds in question?

A. Yes, sir.

Q. Did you deliver those letters to Mr. Opdyke?

A. I think so. I never have seen them since, and so I think I gave them to him.

Q. What was the amount of the bonds those letters called for?

A. As near as I can recollect now, it is about $550,000 of bonds.

Q. Was the order upon Opdyke given to you by Mr. Littlejohn? Can you state what the substance of that order was?

A. The first order was for $240,000 of first-mortgage bonds; the next order I don't remember the amount, but it was for a large amount; my recollection is that those two orders covered over $500,000 of first-mortgage bonds.

Q. Do you remember the language of the order? Did that paper order the delivery of the bonds, or what did it order?

A. It ordered the delivery of the bonds under my contract and under the arrangement and agreement that had been made between Opdyke, Littlejohn, and myself when the trouble came about as to the delivery in the first place.

Q. Was Mr. Opdyke one of the trustees under that first mortgage of the road?

A. Yes, sir.

103 Q. Did he state to you that he had received those bonds to sign as trustee?

A. Yes, sir.

Q. Towards the close of the time of your contract with the New York and Oswego Midland was there any arrangement of settlement entered into between you and the company?

A. There was.

Q. Is the paper now shown you the agreement as to the manner in which the contract should be settled?

A. Yes, sir; that is the agreement.

Mr. CLARKE: I offer this paper in evidence, being the paper setting forth the terms of settlement between Culver and the New York and Oswego Midland as to his original contract, that contract being already in evidence.

The WITNESS: That was the settlement of the amount due and is dated December 31st, 1872.

The paper was received and marked Defendant's Exhibit No. 20, and which is as follows:

This agreement, made the thirty-first day of December, 1872, by and between the New York and Oswego Midland Railroad Company, of the State of New York, party of the first part, and Delos E. Culver, of Jersey City, in the State of New Jersey, party of the second part:

Whereas the said party hereto of the second part did heretofore

and on or about the 15th day of July, 1871, contract with the party hereto of the first part to construct that portion of said company's railroad lying between the village of Walton, in the county of Delaware and State of New York, and a point near the west end
104 of the Neversink tunnel, in the county of Sullivan and State aforesaid, being a distance of about seventy-three miles, and to do and perform all necessary acts in relation thereto;

And whereas the said work of construction has been nearly completed by the said party of the second part, and whereas it is deemed for the mutual interest of both parties to the contract that that portion of the said work which is not in an advanced state be settled and the contract cancelled on and after the first day of January, A. D. 1873:

Now, therefore, this indenture witnesseth that the parties hereto, in consideration of the covenants and agreements herein set forth, mutually covenant and agree to conclude a final settlement of said contract of July 15th, 1871, in the following manner, to wit:

The said party of the second part is to finish and complete the grading and tunnelling, masonry and bridging, and all the depots, water stations, and other buildings, now under way, embraced within this contract and turn over the same to the party of the first part, the same finished and completed, at as early a day as the circumstances will admit of; and the said party of the second part hereby further covenants and agrees to allow and credit the said company for all the work of ballasting and track-laying remaining to be done under his said contract after January 1st, 1873, at the rate of four hundred and fifty (450) dollars per mile for track-laying and at the rate of fifty cents (50c.) per cubic yard for ballasting; and the said party of the second part hereby further covenants and agrees
105 to allow and credit the said company, for buildings and stations and for all the work which the said party of the second part is bound to do under his said contract, the actual cost for doing said work; and the said party of the second part hereby further covenants and agrees to allow and credit the said company the amount of the actual cost of all work not done by the said party of the second part, in the first and second mortgage bonds and stock of said company, at the following rates, to wit, thirty-four per cent. of the gross amount of work done in the first-mortgage bonds, thirty-seven per cent. in the second-mortgage bonds, and twenty-nine per cent. in the capital stock, the first-mortgage bonds at ninety per cent. of their par value, second-mortgage bonds at seventy-five per cent. of the par value, and stock at forty per cent. of the par value.

And the said party of the first part hereby covenants and agrees that the said party of the second part shall be paid in cash for all extra work which shall have been done by the said party of the second part in excess of the work required to be done under his said contract at its exact cost to said party of the second part; that up to the amount required as aforesaid to be done the said party of the first part covenants and agrees to pay for the same in the securities and at the rates hereinbefore mentioned.

And the said party of the first part covenants and agrees to as-

sume any contracts made by the said party of the second part for the completion of buildings, structures, or fences not yet commenced by the said party of the second part; and the party of the
106 second part covenants and agrees that he will allow and credit the said company and they may charge him with the price which he, the said party of the second part, agreed to pay for the same.

And the said party of the second part covenants and agrees that he will do no work under his said contract after February 1st, 1873, except in so far as it is necessary for him to finish the building and gradings as herein covenanted to be done by him.

In witness whereof the party of the first part has caused these presents to be signed by its president and its corporate seal to be thereunto affixed, being thereunto duly authorized by its board of directors, and the party of the second part has hereunto set his hand and seal the day and year first in this indenture written.

[SEAL OF COMPANY.] NEW YORK & OSWEGO MIDLAND R. R. CO.,
By D. C. LITTLEJOHN, *President.*

Attest: THED. HOUSTON, *Sec't'y.*

D. E. CULVER.

As to signature of D. E. Culver, witness—

J. O. SEYMOUR.

The defendant then put in evidence the minute book of the New York & Oswego Midland R. R. Company and read therefrom a minute under the date of January 29th, 1873, and set forth on page 395 of said book, as follows:

"Resolved, That the matter of the releasing Mr. D. E. Culver from his contract be referred to a committee of four, of which
107 committee the president shall be chairman, with full power to enter into an agreement with Mr. Culver for that purpose."

Unanimously adopted.

Q. Will you state whether under that agreement of settlement you had any conference with a committee of the New York & Oswego Midland and whether the amount which should be deducted from the original contract was agreed upon at that conference, and also the facts in relation to the contracts.

A. I had a conference with the committee, consisting of Mess. Littlejohn, the president, and Directors Clark and Low.

By Mr. PARKER:

Q. What Mr. Clark?

A. A gentleman from central New York, whose first name I don't remember.

At that conference it was agreed that the cash value for work to be performed by me to fully meet the claim of the company—what they claimed to be my contract—was 69,000. I claimed that they owed me a separate and extra bill besides that. But to complete

the contract according to their claim, I agreed that an amount of $69,000 should be deducted, after the conference with their engineer and myself. This was agreed upon as an amount to be taken out at the final meeting. That was deducted out of my contract for stock and second-mortgage bonds, etc.

Q. Now, will you state what amount is due you after deducting the amount of $69,000 in cash therein agreed to be deducted upon this conference with the committee.

108 A. As near as I can make it out, when I swore to it in my bankruptcy proceedings in 1873 it was to be $600,000, with interest to that date.

Q. In first-mortgage bonds?

A. It was then all due in first-mortgage bonds and stock.

Q. How much in stock?

A. $400,000 and upwards in stock at par. After deducting the amount to be allowed to the company in this settlement there was upwards of $400,000 in stock.

Mr. CLARKE: I offer in evidence the journal of the New York and Oswego Midland road and the entry there at page 203 in regard to the amount in stock. The entry is as follows:

"Oswego, December, 1872, Nevals & Co. — D. E. Culver, Dr. to subscription, capital stock, to apply on contract, $1,250,000."

That was the amount to be received by him in stock upon the original contract.

I also offer the entry on page 386 of the same book:

"New York, November, 1873, capital stock, D. E. Culver debtor to Nevals & Co. Credit D. E. Culver for stock charged back, never delivered, $445,000."

Q. State how it is that that entry is 445,000 and the claim you make is only $400,000 of capital stock.

A. Because I do not think the company in this claim here have charged up to me the things which they should have charged up to me—things which they should have charged back in regard to the stock under this settlement, for one thing, and I think

109 that I gave orders, which perhaps never came to the company, for two lots of stock, and my best recollection is they were about $10,000 each. That was my recollection at the time as to the amounts. That stock was to be given to people where I had sold it to them, to be delivered by the company to people I had sold it to, and therefore, in making up my estimate of what they owed me on that, the differences altogether was $400,000 of the stock of the company at par when I went to make up my schedule in the bankrupt proceedings.

Q. On your original contract did you go to the receiver of the New York and Oswego Midland and demand this stock?

A. Yes, sir.

Q. Who was the receiver?

A. Abram S. Hewitt.

Q. What did he say?

A. He said he had no authority to give it without suit or an order of the court.

The defendant then proved that the following were the terms agreed upon between the committee appointed by the New York and Oswego Midland Railroad Company to settle, under the contract of December 31st, 1872, with Delos E. Culver as the amounts which should be deducted from the original consideration due him under the contract of July 15th, 1870, because of the completion of part of the work by the company instead of Mr. Culver.

Memorandum of Settlement.

Q. Amounts agreed upon a final settlement with committee.

	28.38 miles track-laying at 450	$12,771
110	48,384 c. yds. ballast, at 50c.	24,192
	Building and work to be done by Co.	32,037
	Total	$69,000

The company to retain in securities as follows for above amounts:

$50,000 stock at par, at 40%	$20,000
34,000 2nd-m'tg'e bonds, at 75%	25,500
26,700 1st-m'tg'e bond-, at 90%	24,003
Total	$69,000

Co. to retain cash cr., $3.00.

The amounts of the various securities above named, specified in the original contract, which D. E. Culver was to receive are to be reduced as above stated.

LITTLEJOHN, CLARK, LOW.

The defendant then put in evidence Exhibit No. 29, being the advertisement by his assignee in bankruptcy, Washington B. Williams, of the sale of the assets of the bankrupt, Delos E. Culver, reciting, amongst others, the following choses in action. The same is abstracted as follows:

"*Assignee's Sale.*

District Court of the United States for the District of New Jersey.

In the Matter of DELOS E. CULVER, Bankrupt.

By virtue of an order of sale in the above matter by the district court of the United States for the district of New Jersey, on the eighteenth day of September, A. D. 1875, I shall expose to sale at public vendue, to the highest bidder, on Thursday, the twenty-first day of October, twelve o'clock at noon, at Gibson's real-estate exchange, 31 Montgomery street, Jersey City, the following assets
111 of the estate of said bankrupt, the same being all of the personal assets which have come into my hands or knowledge

not heretofore sold or collected, and all the real estate, for equitable or beneficial interests therein, in the State of New Jersey, belonging to said estate in bankruptcy.

(Number of securities recited.)

Choses in action as follows:

Delos E. Culver's claim on the N. Y. and O. Midland Railroad Co. for work performed and materials furnished and damages, payable in stock to amount of $400,000.00, as set forth in his schedule.

Delos E. Culver's claim on the N. Y. & O. Midland Railroad Co. and George Opdyke for breach of contract in not delivering the first-mortgage bonds of said railroad company to amount of $600,000.00, as set forth in his schedule.

Delos E. Culver's claim against Allen, Stephens & Co., bankers in New York, under separate names of Benjamin F. Allen, Wm. A. Stephens, and Herman Blennerhassett, for balance of account stated to be about $22,000.00, and a number of others.

Chattels.

Equities of redemption.

Interests in land, legal and equitable.

Dated September 27th, 1875.

WASHINGTON B. WILLIAMS, *Assignee.*"

The defendant put in evidence order of sale of assets in bankruptcy, Exhibit No. 9, made by the district court of the United States for the district of New Jersey in the matter of Delos
112 E. Culver, bankrupt, dated September 18th, 1875, and abstracted as follows:

"That the said assignee do proceed to sell all the other assets, both real and personal, lands, chattels, securities, and choses in action of any kind, at public auction at three weeks' notice, published in the Evening Journal, a newspaper of Jersey City, in this district, and have notice by mail to all creditors who prove their claim against the bankrupt's estate.

"Dated September 18th, 1875.

"JOHN F. NIXON."

The defendant further proved that the claim against Allen, Stephens and Company and the New York and Oswego Midland R. R. Company and George Opdyke, recited in the memorandum of February 24th, 1876, were part of his bankruptcy assets, and became the property of Washington B. William-, defendant's assignee in bankruptcy, through assignment from the registrar in bankruptcy, and that the same was sold under the order of sale, and advertised as above stated, at public auction by Washington B. Williams, his assignee; that Delos E. Culver bid in the claim in the name of John McGregor, having been requested to do so for the same, at nine dollars ($9) for the three; that a formal bill of sale of said claims was made out by Washington B. Williams, the assignee of Delos E. Culver, to John McGregor, one of the directors of the American Trust Company of New Jersey, and the $9.00 paid for said claims

at said auction sale is the same $9.00 which is charged against defendant in Whitehead's letter, reciting the choses in action, dated July 26, 1877, and marked Defendant's Exhibit No. 61*a*.

113 The defendant further proved that the claim against Allen, Stephens & Co. was for $22,000.00; that the trust company advanced about $4,000 to defray the expenses of such prosecution, and that the judgment was recovered for $25,000, after a long and stubborn litigation, on September 4th, 1877.

That suit had been begun on said claim prior to filing of the petition in bankruptcy against the defendant in the district court of United States for the district of New Jersey September 23rd, 1873.

The witness further testified that during the pendency of the reorganization proceedings in respect to the New York and Oswego Midland railroad he dealt in the securities of that road and sold judgments, notes, and bonds of that road up to the time when reorganization took place in 1880; that the highest prices were 15% on the dollar for small lots and 12 and 14% on the dollar for large lots.

That this percentage was on stock at par and afterwards it was on debts, judgments, or bonds or any obligations on which interest ran. The above percentage was obtained on the obligation plus interest to day of sale, and that such obligation sold at 8%, 10%, and 15%.

Q. Between what dates did those prices range?

A. According to my recollection they ranged—well, I would not be able to state the time when they began, but I can tell more definitely the time when it ended. I think the last ending was some time in the year 1880, and then the company was reorganized and the time fixed for shutting everything out that was not then in, the time fixed for not taking any more securities.

114 Q. Do you recognize this contract now shown you?

A. Yes; I do.

Q. What is it?

A. It is a contract, dated New York, January 21, 1880, made between myself and Walter S. Gurnee, by which I sold him $100,000 of these securities.

Mr. CLARKE: I offer this contract in evidence, showing the value of the securities at that date.

Mr. PARKER: I object.

The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. What was the market value of the judgments or promissory notes at this time? And state specifically the dates of the price as they ranged during that time. Did they go up and down, or how was it?

—. Yes; they went up and down—according to the demand and apparently largeness of the offerings. Some people only wanted small quantities. I should judge that the fair market value at the time that that plan was promulgated was about 10 per cent. I

should think that was about the average market value of the securities.

Q. State the extremes of the prices for the notes and judgments.

A. 15 was the highest.

Q. And what was the lowest, to your recollection?

A. I think 6 was the lowest.

Q. State, also, the lowest and highest prices of the stock, to your recollection.

A. I am speaking now of stock alone, because they had the same value. A judgment or common stock or a note had
115 the same selling value, for they all called for the common stock in the reorganized New York, Ontario and Western railroad. By the payment of an assessment of 20 per cent. new stock was delivered in place of the old, and the new stock got by these payments was listed upon the board and sold in the street, and the difference between 20 per cent. and what the new stock sold for apparently after the new stock began to sell seemed to govern the value of the securities, because a party could buy $10,000 of these old securities at par and by paying $2,000 he could get the amount in new stock, and that would sell on the market, and the difference between what that cost in the market and what the stock would sell on the market for was what these things were worth.

By Mr. PARKER:

Q. Did you act under that contract just offered in evidence as trustee for some one else?

A. No; I was acting undoubtedly for some of my creditors who had these notes, provided they would let me use them and make some value for the American Trust Company.

By Mr. CLARKE:

Q. Then you were acting for somebody else?

A. Undoubtedly yes, in this sale to Gurnee. I was paying up my old debts by making these securities valuable.

The witness further testified that he requested the trust company's officers to prosecute the claim against the New York and Oswego Midland and George Opdyke.

That he requested Mr. McGregor and Mr. Whitehead to begin suit against them under his contract.

116 That these request were made twice or three times after his indebtedness had been renewed under the memorandum of February 24th, 1876, and before the trust company failed, but the officers had answered on the first time that they wanted to see how the claim against Allen, Stephens & Co. turned out, as it cost so much money, and at the last time Mr. Whitehead had said they had no money, that they were hard pressed for money, and that if defendant would give them $10,000 he would turn it all over to defendant.

On cross-examination the witness testified that he was by profession a civil engineer; that the amount of his scheduled assets in

bankruptcy were about $800,000; that at the bankrupt sale of his assets he had bought a number of them for other parties; that in respect to the claim against Allen, Stephens & Co., at the time of the February 24th, 1876, memorandum, suit had been begun against Allen, Stephens & Company.

Q. What papers went into the hands of the trust company, to your knowledge, as to these assets?

A. To make the claim against Allen, Stephens & Company good required my books of account, my memorandum agreements, my full agreements, my tickets of sale made by them to me, of the sales of the bonds that they had made for me, and what they had credited me with for the sales of bonds, and receipts acknowledging the bonds that they had received, and balance due me for coupons collected by them and not returned; there were the different papers. Many of the other loose papers which got scattered around had to be looked up, and witnesses had to be found to prove the
117 correctness of these papers, and all that sort of thing, and then there was attendance at the court to produce those and bring the papers before the court and to keep possession of them.

Q. I ask you what papers went into the hands of the trust company.

A. They went to the trust company's lawyers; I don't know whether they went to the trust company or not.

Q. I am speaking to you and as to your knowledge.

A. I have given it to you.

Q. What papers, to your knowledge, went into the hands of the trust company as to that claim?

A. If you tell me what you mean by the trust company—the papers went to them or to their lawyers; I can't tell which.

Q. Was there any change of lawyers?

A. That I don't remember.

Q. Was not your brother, Mr. James W. Culver, and his partner, composing the firm of Culver & Shoudy, the firm of lawyers in whose hands this prosecution was when you made the arrangement?

A. I remember they were lawyers in the case.

Q. But don't you remember that they were the lawyers in whose hands this prosecution — at the time you made the arrangement with trust company?

A. I don't think it was.

Q. Who were they?

A. I think it was James Culver and some other lawyer. I think that other lawyer went out and Mr. Shoudy came into the case.

Q. A partner of Mr. Culver?

A. He may have been a partner later.

118 Q. Who selected Mr. James W. Culver as the lawyer?

A. I couldn't state how it first began. My recollection is that it was in my own name that the suit was brought and that I selected him.

Q. And after that he continued to the very end, did he not?

A. Yes, sir.

Q. Now, as to the claim against Opdyke and against the Oswego Midland Railroad Company. What papers went into the hands of the trust company, to your knowledge?

A. I exhibited to the trust company.

Q. I didn't say anything about exhibiting; you have already told me that.

A. I don't know, for I can't remember, and I can't tell you.

Q. But do I understand you to say that you exhibited the papers?

A. Yes, sir.

Q. That you have already said this morning?

A. Yes, sir.

Q. Yesterday did you not say—and was it not the fact—that that contract had remained always in your possession?

A. I think it did. I think I only showed it, but took it back with me. I am very positive of that, that I kept those papers in my possession.

Q. And do you recollect no other papers that related to your claims that were handed over to your company?

A. I can't remember.

Q. Try.

A. It was a great while ago.

119 Q. You have remembered a great deal that was a great while ago.

A. Some things that were pertinent to my own interest I would remember, but I don't or can't recall things that I didn't try to keep a record of. I don't remember those.

Q. And such a fact as this you can't remember?

A. I don't remember now. I may think, and I will try.

Q. Well, this Allen, Stephens & Co. suit resulted in payments which have been made in this suit, did it not?

A. I understood so. It resulted in getting a judgment as to the amount we claimed, and then the parties became insolvent apparently, and they were settled with.

Q. And that was with your consent?

A. That was with my consent.

It was then proved that suit had been begun by Delos E. Culver against Allen, Stephens & Co. upon the chose in action above specified some months prior to the bankruptcy proceedings in September, 1873, and the suit finally resulted, after a long litigation, in a judgment in favor of the plaintiff for twenty-five thousand dollars, September 4th, 1877.

The American Trust Company of New Jersey expended $4,329.21 in prosecuting that claim, and that included in that amount was a one thousand dollars paid as an extra counsel fee.

The witness as to this point testified as follows:

Q. This judgment against you consists first of the old debt, does it not?

A. Yes, sir.

Q. Then of the $5,000 of which you have spoken?

120 A. Yes, sir.

Q. Wasn't there an additional sum of $1,000, represented by five 200-dollar notes, that was a subsequent advance?

A. Not to me. I gave notes for that $1,000, but it was an advance to pay those lawsuits. I never had a penny from them myself.

Q. It was an advance to pay in your lawsuit?

A. Yes, sir.

Q. Was it not obtained under the pledge that this sum at any rate would be repaid?

A. When I could; yes, sir.

Q. When you could?

A. When I could; certainly.

Q. Wasn't it a part of the pledge that that money was to be paid anyhow?

Mr. CLARKE: I object to that on the ground that the notes speak for themselves. If the court please, the writing speakes for itself.

Mr. PARKER: The witness has said that this was money that went to somebody else and not to him, and I want to show by him that he had promised especially to pay these five 200-dollar notes, from which an inference might be drawn as to whether he was mistaken as to the other allegation.

Answer. I think that was a matter not connected with the transaction at all, if you knew the real fact of it.

Q. It was in the judgment a charge connected with the transaction?

A. It was not, because I did not defend the judgment, for reasons. I did not defend the suit at all.

121 Mr. PARKER: Mr. Culver, I want answers as to facts, and please remember again that I do not wish you to volunteer anything further than simple answers to my questions.

The WITNESS: I will try not.

Q. I have a few letters of yours. Was it not your understanding and did you not communicate the expectation that these notes that you gave would be paid immediately when due?

A. Do you mean the $1,000?

Q. No; I mean all of them.

A. If I should realize out of the assets all of them were to be paid. It never was my expectation that would be paid any other way in the world unless I could make the money.

Q. What time were they to run?

A. I don't remember.

Q. Were they not six months?

A. I don't remember. *Q.* One note was dated February 24th, 1876, and was due June 27, 1876; another due November 27, 1876.

Q. Please look at the paper I now show you, being a letter dated December 6, 1876. In whose handwriting is that?

A. That is my handwriting.

Q. What was that case?

A. A case connected with the reorganization of the Jersey City and Albany railroad.

Q. It was not a thing pledged to the trust company?

A. It was one of the things I expected to get money out of.

122 The Haverstraw bonds were not pledged to the trust company, but the Rockland Central bonds and stock were intended to help that operation.

Q. You went on and, notwithstanding this, those notes were renewed whenever they came due, were they not?

A. Shall I tell you why that was done?

Q. I am not asking you that.

A. They were sometimes renewed and sometimes not.

Q. Were they not all renewed and incorporated in those that were put in the receiver's hands?

A. The plan of the company was to embody the interest and have a new note given when the interest would draw interest. I said no, but they insisted that they ought to have interest on interest, and I yielded finally, and that is the way the note came to be renewed all the while.

Q. So the matter went on until the receiver came in, and then he applied to you for payment of those notes, did he not?

A. I think he did.

Mr. PARKER: I call upon the other side to produce a letter from the receiver to Mr. Culver, dated Feb. 13, 1879, and another of March 17, 1879.

Q. The expense of this Stephens suit was paid from time to time largely as the suit went along, was it not?

A. That is my recollection.

Q. At one time there was an account made up, I think, for some $2,300, which was paid by the trust company and for which you gave a note?

A. That may be, but I don't remember.

Q. Don't you recall that?

A. I don't recall the fact, but I think I consented always

123 to give notes if they wanted them, so that they might get their compound interest.

Q. It is the ordinary way for persons, when they have made a note, to renew it again. Bankers do it all the while, don't they?

A. When that is the agreement—that it is to be renewed—why, that is the way that it is done.

Redirect examination by counsel for defendant:

Mr. CLARKE: I offer in evidence letter from Mr. Whitehead to Mr. Culver, dated Nov. 23, 1876.

(This letter is read in evidence and marked Defendant's Exhibit No. 101, and was as follows:)

Daniel M. Lyon. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley.

The American Trust Company of New Jersey.

NEWARK, N. J., *Nov.* 23, 1876.

Jas. W. Culver, Esq., No. 59 Liberty street.

DEAR SIR: Having extended all forbearance possible in the suit *vs.* Stephens, &c., Mr. Gregor has desired me to say to you that he cannot consent to any further delay in the prosecution of the suit to which the defendants are not legally entitled. He hopes that you will press the suit forward to a conclusion as rapidly as possible.

Very respectfully yours,
WM. A. WHITEHEAD, *Treasurer.*

Mr. Clarke then offered in evidence a letter written by Mr.
124 Whitehead to the defendant Culver, dated June 24, 1876.

(The letter from Mr. Whitehead to Culver, dated June 24, 1876, was read in evidence and marked Defendant's Exhibit No. 102, and of which the following is a true copy:

Daniel M. Lyon. Wm. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley.

The American Trust Company of New Jersey.

NEWARK, N. J., *June* 24, 1876.

Mr. D. E. Culver, Jersey City.

D'R SIR: When I last had the pleasure of seeing you, you were in expectation of favorable news respecting that Stephens suit. As another meeting of the board of trustees will shortly take place, I would be pleased to hear from you the state of things at present in relation both to that suit and to the issue of the stock.

Very truly y'rs, WM. WHITEHEAD, *Treasurer.*

Your note for $4,631.27 and interest matures on the 27th.

Defendant's counsel also reads in evidence a letter from Whitehead to Culver & Shoudy, dated April 21st, 1877, and it is marked Defendant's Exhibit 103, and of which the following is a true copy:

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley.

125 The American Trust Company of New Jersey.

NEWARK, N. J., *April 21st*, 1877.

Messrs. Culver & Shoudy, No. 50 Wall St., New York.

GENTS: Your draft upon Mr. McGregor for $100 was paid to-day, although, allow me to say, very unwillingly nearly twelve hundred dollars have now been advanced on account of claims in which Mr. D. E. Culver is interested, without, so far as can be seen, any cor-

responding benefit, and I am instructed to inform you that no further expenses will be paid on account of the suit you have now in hand until it is closed.

Although the letter addressed to Mr. D. E. Culver on the 14th was to be forwarded to him whereever he might be, nothing has been heard from him yet in reply.

Very respectfully y'rs, WM. A. WHITEHEAD, *Treas.*

Also a letter from Whitehead to the defendant Culver, dated July 13th, 1878, and it is marked Defendant's Exhibit 104, and of which the following is a true copy:

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
James V. Bentley, sec'y.

The American Trust Company of New Jersey.

NEWARK, N. J., *July 13th*, 1878.

Mr. D. E. Culver, Jersey City.

126 DEAR SIR: Some propositions have been made to us by Allen, Stephens & Co. It is very desirable that we should have a conference with you Be good enough to name some day and hour when you can meet with the executive committee at this office.

Very respectfully y'rs, WM. A. WHITEHEAD.

Will meet at 10 on Monday at your banking office.

Also a letter from Whitehead to the defendant Culver, dated Sept. 26, 1878, and it is marked Defendant's Exhibit 105, and of which the following is a true copy:

Daniel M. Lyon. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley.

The American Trust Company of New Jersey.

NEWARK, N. J., *Sept.* 26, 1878.

Mr. D. E. Culver, Jersey City.

DEAR SIR: I write to you at the request of Mr. McGregor to inquire what was the result of your interview with Messrs. Stephens and Blannerhassett. If you have not yet seen them he hopes that you will do so at once, as it is very necessary that something should be realized from them, if possible, without delay.

Very truly yours, WM. A. WHITEHEAD,
Treasurer.

127 By Mr. CLARKE:

Q. This suit against Allen, Stephens & Co., was it or not begun before your bankruptcy?

A. My recollection is that it was begun before.

Q. You have seen the letter of Mr. Whitehead charging you with the expenses in that suit that were paid to Culver & Shroudy, the letter being Defendant's Exhibit No. 61. Will you state whether you

forwarded to Mr. Whitehead the note requested by him in the letter?

A. I believe I did.

Q. Then, when you said in your letter of Dec. 6, 1880, to Mr. Wilkinson, "subject, however, to pay J. W. Culver ten per cent. of the recovery, as per my agreement with him when I placed the claim in his hands," what were you referring to? Was it an agreement made prior to your bankruptcy or not?

A. Yes, sir.

Q. What was the arrangement between yourself and the trust company as to the manner in which the original notes were to be paid—the notes which were given with the collaterals?

A. They were to be paid as fast as the avails of those securities and assets of mine would pay them, and if after the recovery of the whole of them there was not money enough to pay them all, handled according to my judgment and my help and assistance, I was to pay the balance. That was the arrangement. Nothing was said then, at the time, about renewals of notes, because it was expected
that the assets would come in early. If the Haverstraw bond
128 matter had gone our way we would have had money right
away. But when the renewals came around they proposed to have interest compounded. I did not feel that they ought to have the compound interest. They said that all their debtors paid them interest upon the renewals if they would not pay the note for the whole amount.

The defendant asked leave of the court to withdraw from the case that portion of the answer that alleges the fraud in obtaining the judgment on the original note. Motion granted.

Thereupon the court ruled that everything tending to prove fraud in obtaining the judgment in New Jersey was excluded, and defendant submitted to the ruling.

Mr. CLARKE:

Q. Then in your letter of Nov. 25th you say, "It is impossible for me to pay the note until I can make the assets available. My railroad foreclosure matters are progressing as fast as the law permits." State what railroad foreclosures you refer to.

A. To the Jersey City and Albany foreclosure and the foreclosure of the Western extension and the New York & Oswego Midland, no doubt.

Q. So far as the Ridgefield Park and Rockland Central bonds were concerned, were they concerned in the Jersey City and Albany foreclosure?

A. Yes, sir; I was interested in four foreclosures. That is something not in any way connected with this matter. It was other matters in connection with other creditors.

129 Q. When, in your answer to Mr. Wilkinson's letter of Feb. 19th, 1879, you say, "But shall not be in any shape to pay even $100 before the first day of May, at which time I shall un-

doubtedly be able to take up all notes and be in position to make a fair offer in the whole matter," state what those notes were.

A. They were the notes that Mr. Parker asked me about, and they were 1,000 given as counsel fee in the Allen, Stephens & Co. case. I insisted strongly upon doing it, but they did not think we ought to, but said that if I would agree to pay those notes outside of this matter they would do it. They are five notes of mine for $200 each.

By Mr. CLARKE:

Q. When you say "to settle the whole matter," what do you refer to?

A. I mean to take the whole debt out of their hands and the assets and everything; and I think I wrote Mr. Wilkinson a letter offering to give so many shares of stock, and really I had arranged my affairs so as to do it if he would agree, and carry the judgments or collaterals and claims somewhere else.

Q. That was as late as Feb. 12, 1880, that you wrote that proposition?

A. Yes, sir; undoubtedly.

By Mr. CLARKE:

Q. What was the value of the Ridgefield Park and Rockland Central bonds from the time of the making of this agreement up to about the year 1880?

Mr. PARKER: I object to that as irrelevant.

Mr. CLARKE: That is a step in the chain of evidence.
130 We shall show that the Ridgefield Park mortgage was foreclosed, and that the securities held in the hands of the trust company became valueless by that foreclosure. We shall show that this loss of value occurred during this period, and that the bonds became valueless as soon as that reorganization proceeding resulted in a sale and reorganization of the company. We want to show that the mortgages on these roads securing the bonds in question were foreclosed and finally resulted in a sale under foreclosure in the year 1880, and that the securities became valueless after the reorganization. We want to show that prior to that time the securities were valuable, and that the trust Co. and the receiver had notice of these proceedings, and that unless something was done with them they would become valueless by foreclosure, and that the trust Co. failed to act in any way upon the securities. We wish to show that they were notified of the last day on which the opportunity could be availed of upon a reorganization; that that was some time in the spring-time of 1880. They were notified that the foreclosure would be completed, which foreclosure would wipe out these bonds, in the spring of 1880.

The COURT: Do you wish to show that the trust Co. and the receiver were notified at the last day that the reorganization was affected, and that foreclosure would wipe out the bonds?

Mr. CLARKE: That is it.

The COURT: The evidence is to be excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

131 DE WITT C. LITTLEJOHN, a witness for the defendant, being duly sworn, testifies as follows:

By Mr. CLARK: Do you know Mr. Culver, the defendant in this action?

A. I am acquainted with him.

Q. And had dealings with him?

A. Yes, sir.

Q. State whether you were the president of the New York & Oswego Midland.

A. I was president from the time of its organization until the failure in 1873.

Q. Is this your signature on this contract as president of that road (showing witness Def't's Exhibit No. 19)?

A. That is my signature.

Q. And is that the seal of the road?

A. Yes; or was.

Q. Do you remember the execution of that contract?

A. I do.

Q. Will you state whether Mr. Culver completed that contract and what was done by him in relation to it, to your knowledge?

A. It was not fully completed. The work was not fully completed under the contract.

Q. Will you state what you remember, if anything, in relation to what occurred about the trustee failing to sign the bonds that were required to be given?

A. One of the trustees at least refused to execute the bonds, and by some process of the court he was afterwards required to do so.

Q. Will you state whether Mr. Culver had an interview
132 with you about the time that the company was unable under this contract to deliver the first-mortgage bonds, and will you state the substance of that interview?

A. There was an interview between Mr. Culver and myself and probably with our board. The dark times of 1873 were coming on and our securities became unsaleable. A large piece of territory in the center of our road was unfinished, and we made a bargain with Mr. Culver. This was the contract: to take certain securities and go on and complete the road. Afterwards we found it became necessary to avail ourselves of Mr. Culver's financial experience and large acquaintance in the city, and we terminated his contract by the road agreeing to complete what was unfinished and he deducting from the contract price certain amounts.

Q. Now, will you state what arrangements were had between you and Mr. Opdyke and Mr. Culver in relation to his accepting notes under the engineer's estimate in place of the first-mortgage bonds? You have heard his testimony, and thus that refreshed your recollection.

A. I did not hear his testimony.

Q. What conversations were had between you and Mr. Culver, especially in respect to Mr. Culver's going ahead when you failed to give him the first-mortgage bonds, they not being signed? State what occur-ed between you in regard to his going ahead and completing the work and taking notes in the interim, and which you were to take up by the delivery of bonds afterwards.

A. I remember there were such transactions, and — purpose was to keep the work going during that period when the bonds
133 were not being signed and delivered. I think Mr. Culver negotiated notes of the company and went on with the work, expecting to receive the bonds subsequently.

Q. Will you state what is your recollection in regard to Mr. Culver demanding the bonds finally when the trustees had signed them, and what you did in relation to delivering them to him?

A. Mr. Opdyke was our financial agent in this city, and it was my right to draw orders on him from time to time for any of our securities, and I did draw orders to meet the requirements of the contract with Mr. Culver. I can't tell just the amounts or when they were drawn, but they were drawn from time to time as the provisions of the contract required.

Q. Do you know whether those orders were accepted by Mr. Opdyke or not?

A. Some may have been, and some I know were not, or I did know at the time.

Q. Did Mr. Opdyke sell those bonds and credit the company with them, to your knowledge? And I mean some that you gave orders upon him for to Mr. Culver.

A. His firm sold a large number of our bonds and used them to make themselves pretty secure at that time—to pay themselves. I think so.

Q. Do you remember what time it was that you gave an order to Mr. Culver on Mr. Opdyke for bonds upon this contract?

A. I could hardly state the date, but it was in 1873, I think.

Q. Can you state the amount?

A. No; I cannot remember the amount. Those things have passed from my mind. I had given them no thought until
134 I was coming here as a witness.

Q. Look at this contract of settlement (Plaintiff's Exhibit No. 20) and see if that bears your signature, and is the seal there the seal of the company?

A. Yes, sir.

—. Is this the contract of settlement?

A. Yes; I think it is.

Q. Do you remember that you were one of the committee who were appointed under that contract to agree upon a settlement and upon the amounts to be deducted from the original contract?

A. I would have no recollection of amounts so long back, but here is a memorandum on the back of it, and it looks very much like what it was. I have seen this to-day here in court.

Q. If a paragraph from the minute book should be read in which

you were mentioned as one of the committee, would you be able to remember that you were?

A. I was a member of the committee, if that is the question; certainly.

Q. State, if you recollect, how much was to be deducted from the contract price under the terms of that settlement.

A. Do you mean in figures—the total amount?

Q. Yes, sir.

A. I should think this was the memorandum of settlement made by that committee with Mr. Culver. I am quite sure of it. A certain amount of stock and bonds were behind from our contract with Mr. Culver, which we retained to *do* on and complete the work with.

135 Q. What was the amount of that—do you recollect?

A. I could not tell from recollection. I can see an amount here upon this paper which I would think was the amount.

(The memorandum of settlement is read to the jury. It is copied in full on page — herein).

Q. Are you familiar with the claim made by Mr. Opdyke that he was entitled to retain $600,000 of bonds?

A. He did make such a claim.

Q. Do you know whether that claim was well founded?

A. I do not think it was, sir. I know it was not.

Q. Were you familiar with all the transactions between Mr. Opdyke and the New York and Oswego Midland?

A. I was at the time, but since the road went into the hands of a receiver I have taken no interest.

Q. Did you not claim that under the arrangement between Opdyke and your company he was under obligation to deliver the bonds?

A. Yes, sir.

Q. And you stated so to Opdyke?

A. Yes, sir.

Cross-examination by counsel for plaintiff.

By Mr. PARKER:

Q. And Opdyke denied it?

A. He refused.

Q. And he justified his refusal in some way, good or bad?

A. He was not a gentleman of very many words. I don't think he gave many reasons. He refused to deliver.

136 Q. What next happened in the history of the company—its failure?

A. Well, sir, I am a country gentleman; it was a pretty large enterprise, and I was quite overawed, and I went to Opdyke myself, and I said, "Sir, if you will take the presidency of this company and carry it through, I will resign." He says, "I *I* will look at the affairs of the company," and he called the board together, and, on examination, the affairs of the company were found satisfactory, and

he says, "I will, and I will take your road through whatever convulsion financially may come."

Q. Then he took your place?

A. He did afterwards.

Q. How soon after that did the receiver take his place?

A. The receiver?

Q. Yes.

A. It wasn't long; I could have carried it longer than Opdyke did myself.

Q. From that time forth what was the chance for any recovery against Mr. Opdyke and how was it to be had; only by suit at law?

A. That is not for me to say, sir.

Q. The date was in 1873?

A. That is the year.

Q. And Mr. Culver went into bankruptcy about the same time?

A. That I know nothing about. I know nothing about his going into bankruptcy at the time and had no knowledge of it.

By Mr. PARKER:

Q. Then Mr. Opdyke did not carry out the contract made with you upon your resignation?

137 Answer. By no manner of means.

It was proved that the American Trust Company of New Jersey became embarrassed about the year 1878, and that in January, 1879, in insolvency proceedings in New Jersey, George Wilkinson was appointed receiver, and that from the year 1876 and after the memorandum of February 24, 1876, nothing was done by the trust company in relation to the prosecution of the claims against the New York and Oswego Midland and the claim against the New York and Oswego Midland and George Opdyke.

BENJAMIN B. KIRKLAND, being duly sworn as a witness on part of defendant, testified as follows:

That he was a stock broker in 1878 and 1879 and four or five years prior thereto and dealt in the securities of the New York and Oswego Midland; in 1878 the price varied for stock, equipment bonds, 2nd-mortgage bonds, from 2 to 5% of the par value.

Promissory notes of the company sold at about 12% of the securities.

The dealings in them were very large. This was in 1878 and '79.

I did a large business in all the securities prior to 1879; I did probably 30,000,000 in those securities.

From 1878 to 1879 the juniors ranged between 5 & 8 and perhaps 10% of the par value and sold in the market at those prices.

During all this time the New York and Oswego Midland was in the hands of a receiver.

The juniors were notes, stock, convertible bonds, equipment
138 bonds, and second-mortgage bonds. Judgments against the company had the same value as notes. The judgments and

the notes brought more money than the stock when it first appeared.

ARTHUR L. PARMLY, a witness for the defendant, testified that he was in the employ of the New York, Ontario and Western Railroad Co., and produced and identified as having come from the archives of the office the journal of the New York & Oswego Midland Railroad Company from December, 1871, *and* December, 1878; also the minute book of the New York and Oswego Midland Railroad Company from January 11th, 1866, to September 1st, 1873, and that the New York, Ontario and Western is the reorganized company formed upon the foreclosure of the mortgage of the New York and Oswego Midland Railroad Company.

It was further proved that George Opdyke from 1873 to his death, about 1880, was worth about a million of dollars, and owned real estate worth that sum; that George Opdyke was a general partner in the firm of George Opdyke & Company as that firm existed in the years from 1871 to 1876.

CONRAD N. JORDAN, a witness for the defendant, being duly sworn, testified that he was familiar with the affairs of the New York and Oswego Midland Railway Company; that the company was sold out under the foreclosure of a first mortgage, and he acted as chairman of the purchasing committee under the reorganization plan; that he bought in the road upon the foreclosure sale, and the company was reorganized by the purchasers.

The defendant further proved that notes and judgments against the New York and Oswego Midland R. R. Company in
139 the year- 1878, 1879, and down to the first day of March, 1880 (which was the last day for all claims to be presented and come in under the plan of reorganization so as to obtain the benefits of that plan), sold at prices ranging from 3⅜% on par value of principal and interest to date of exchange up to 14¼% on par value on principal and interest to date of exchange.

It was further proved that the New York and Oswego Midland R. R. Company made, executed, and delivered on the 1st day of July, 1869, a first mortgage of all its property and franchises to Abiel A. Low, George Opdyke, and Delos De Wolf, as trustees, to secure an issue of eight million of bonds of the company.

(The first-mortgage bonds under Defendant's Exhibit No. 19, agreed to be paid by the company to Delos E. Culver, were a part of this issue.)

That in the fall of 1873 the company became embarrassed and made default under that mortgage.

Thereupon a bill to foreclose the same was filed in the United States circuit court for the southern district of New York on the 13th day of November, 1873, and Abram S. Hewett was appointed receiver of the said railroad, and the road remained in the hands of a receiver until sale of said road under a decree foreclosing said mortgage, in 1880.

The foreclosure suit above referred to resulted in the entry of a

final decree therein on the 2nd day of October, 1876, that the road and all its property and franchises be sold within sixty days and all persons barred of any equity or claim therein unless the said railroad or said other parties paid into court the sum of
140 nine million nine hundred and seventy-six thousand and twenty-three dollars in gold coin, and also the further sum of two hundred and forty-five thousand seven hundred and sixty-five $\frac{22}{100}$ dollars in money and interest from July 2, 1876, adjudged to be due under said mortgage to the holders of bonds issued under and secured thereby, and also counsel fees, expenses of suit, and receiver's certificates.

Under this decree all the property and franchises of the said railroad were duly advertised and sold by Kenneth G. White, master, at public auction, on the 14th day of November, 1876, to Conrad H. Jordan for the sum of four million six hundred thousand dollars.

The master filed his report of said sale in said court December 5, 1879, and said report and sale were duly confirmed by an order of said court made January 6th, 1880, directing confirmation and that the master make, execute, and deliver a proper deed to the said purchaser, which was done at said last-mentioned date.

The said Conrad N. Jordan, in buying in said road at said sale, acted for a purchasing committee of certain of the holders of bonds and securities of the road under a plan of reorganization.

After the sale the said parties formed a new company, the New York, Ontario and Western Railroad Company, to which said Jordan assigned the property and franchises bought in.

The reorganization plan was of the usual kind and had been promulgated long before. Under its creditors, stockholders, and
141 the holders of first and other mortgage bonds and securities of the New York and Oswego Midland Railroad Company were to withdraw opposition to judgment in the foreclosure suit and to pool their property and claims with a purchasing committee. The foreclosure suit was then to be pushed to final judgment and sale, and the purchasing committee were to purchase the same, paying therefor cash and outstanding bonds pooled with them. Thereupon a new company was to be formed, to which the property purchased was to be assigned, and new stock of that company was to be issued, together with a new mortgage, and the holders of the different classes of property thus pooled with the committe were, by paying certain assessments, to receive certain amounts of the stock or bonds or other securities of the new company in exchange for the different securities of the old company held by them according to the scale of values, prices, and assessments for the exchange of the old for the new securities fixed by the plan of reorganization.

The sixth clause of the agreement or reorganization read as follows:

"Sixth. At any time within sixty days after the reorganization of the successor company common stock may be issued to the mortgage bondholders or creditors other than the first-mortgage bondholders of the New York and Oswego Midland Railroad Company to the amount due them from said company upon the holders of

said claims or bonds paying to the committee herein named or to the successor company the sum of $20 *on* money for each share of common stock issued to them."

And that by such foreclosure sale and reorganization the
142 floating debts and claims against the New York & Oswego Midland R. R. Co. had become valueless, including the choses in action mentioned in the memorandum of February 24th, 1876.

The defendant further proved that Mr. Whitehead was the treasurer of the American Trust Company of New Jersey at the time of the arrangement between that company and the defendant; that John McGregor was a director of the same at this time and D. M. Lyon was president and director.

D. M. LYON, a witness for plaintiff, on cross-examination testified that he was present at the sale of Culver's assets, when Mr. Culver bought the claims against the New York and Oswego Midland and George Opdyke, and that they were struck down to Mr. McGregor.

JOHN MCGREGOR, a witness for plaintiff, on direct examination testified that he was one of the directors and a member of the executive committee of the American Trust Company from its organization to its failure.

That he was the representative of the company in relation to the Culver loans, and that he saw counsel and negotiated and talked with them in regard to the Allen, Stephens & Company matter.

(Mr. Clarke, on behalf of the defendant, proposed to sum up the case.)

The defendant's counsel claimed that the contract in evidence meant—

That the trust company were to prosecute claims and sell collatera*l* in a reasonable time.

The COURT: I have already stated my idea of the legal char-
143 acter of this contract; that there was no obligation on the part of the trust company to sell the stocks and bonds except upon a request of the pledger, and there was no obligation to prosecute the claims to suit at their own expense, although such prosecution might have been requested by the pledger, and there is no evidence that there was any request to sell the securities, and there is no evidence of what the law calls negligence on the part of the trust company.

Defendant excepted to each branch of this ruling.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Mr. CLARKE: We ask to have the question go to the jury as to the damages arising from the negligence of the trust company under our construction of this contract. We ask that that question be left to the jury and we except to the ruling which excludes it.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

We also ask to go to the jury on the point that the contract is ambiguous and that the jury must view it as to who was to pay the expenses of the transaction, the trust company or Culver, and we think that that question must be determined on the circumstances of the case as the facts have been disclosed. On this theory of the law and on this contract we request the court to let the case go to the jury.

The COURT: I see no question of fact for the jury.

144 Mr. CLARKE: We except to that ruling of the court in manner & form of the foregoing exception. We also desire to note an exception to each specific clause of the judge's decision upon the question as to the meaning of the contract.

The COURT: Gentlemen of the jury, you are directed to render a verdict in favor of the plaintiff in the sum of $76,659.96.

The defendant duly excepted to the direction of a verdict in favor of the plaintiff. The jury returned a verdict for the plaintiff under the foregoing instructions of the court; and whereas the foregoing exceptions do not otherwise appear upon the record of said cause, the defendant's counsel requested the said judge to allow and sign this bill of exceptions containing said several matters produced and given in evidence for the party objecting as aforesaid, according to the form of the statute in such case made and provided, and thereupon the aforesaid judge did, in pursuance of said report & of said statute, so sign and allow this bill of exceptions containing the several matters herein stated, in term time, at the October term, A. D. 1887.

Witness the hand of said judge, at New York city, this 6th day of Jan'y, 1888.

N. SHIPMAN, *Judge.* [L. S.]

(Endorsed:) United States circuit court, southern district of N. Y. George Wilkinson, receiver of, etc., plaintiff, *vs.* Delos E. Culver, defendant. Bill of exceptions. Due service of a copy of the within bill of exceptions is hereby admitted 21st day of Dec.,

145 1887. Edgar P. Hill, att'y for pl'ff. R. Floyd Clarke, attorney for defendant, No. 146 Broadway, New York, N. Y. U. S. circuit court. Filed Jan. 7, 1888. Timothy Griffith, clerk.

146 Supreme Court of the United States of America.

DELOS E. CULVER, Plaintiff,
vs.
GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Defendant. } In Error.

Assignment of Errors.

Of October term, in the year of our Lord one thousand eight hundred and eighty-eight.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Delos E. Culver, by R. Floyd Clarke, his attorney, and says that in the record and proceedings aforesaid of a certain suit that was in the circuit court of the United States for the southern district of New York, held at the city of New York, in said district, wherein the said George Wilkinson, receiver of the American Trust Company of New Jersey was plaintiff, and the said Delos E. Culver was defendant, and wherein judgment was rendered in favor of said plaintiff, George Wilkinson, receiver as aforesaid, against the said defendant, Delos E. Culver, on the 23d day of November, 1887, for the sum of
147 seventy-six thousand six hundred and ninety-eight $\frac{38}{100}$ dollars, and also in the giving of the judgment aforesaid, there is manifest error in this, to wit:

1st. That by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said George Wilkinson, receiver of the American Trust Company of New Jersey, against the said Delos E. Culver, whereas by the law of the land the said judgment ought to have been for the said Delos E. Culver against the said George Wilkinson, receiver of the American Trust Company of New Jersey.

2nd. That the court erred in sustaining the demurrer of the said George Wilkinson, receiver as aforesaid, the plaintiff in said action, to the evidence and proofs presented by the said Delos E. Culver, the defendant in said action, in support of his defences and counter-claims set up in his answer, and further erred in thereupon taking the consideration of the issues of fact raised by the said defences and counter-claims, and the evidence produced to sustain the same, away from the jury duly empaneled to try the same, and directing a verdict for the plaintiff in said action, George Wilkinson, receiver as aforesaid, against the said defendant, for the reason that said proofs had shown that the plaintiff held, as collateral to the judgment sued on herein, certain collaterals, consisting of bonds and choses in action which had been assigned to the company of which he is receiver under a memorandum of Feb. 24th, 1876, fully set out in the 4th assignment of error below; that neither said company nor
148 said receiver had ever taken steps to realize on said collaterals, although repeatedly requested to prosecute by defendant; that said choses in action were good and valid claims, and if prosecuted

could have been recovered upon, and a judgment would have been of value; that the same had been lost through non-prosecution by the pledgee, and defendant's damages were over one hundred thousand dollars, & more than sufficient to wipe out the judgment sued on herein.

3rd. That the court erred in refusing the defendant, Delos E. Culver, the right to open and close the case to the jury under the pleadings.

4th. That the court erred in excluding evidence offered on behalf of the defendant, Delos E. Culver, that at the time the memorandum of February 24th, 1876, was entered into the trust company verbally agreed to prosecute the claims against George Opdyke & against the New York and Oswego Midland railroad and advance the moneys needed, said evidence being offered after proof on the part of the defendant of the facts hereinafter stated, in the manner stated.

The defendant had proved that in August, 1873, he had made and delivered to the American Trust Company of New Jersey, for loans then made, two certain promissory notes, of fifteen thousand dollars each, payable to the order of said trust company in four months after date, and reciting a pledge of in all forty-nine first-mortgage Western extension bonds of the New York and Oswego Midland Railroad Company for one thousand dollars each, amounting to forty-nine thousand dollars.

That thereafter the defendant, on December 1st, 1874, was duly discharged in bankruptcy proceedings in the United States
149 district court for the district of New Jersey from all debts which existed prior to September 23rd, 1873, including said notes, and that Washington B. Williams was duly appointed assignee of said defendant and in said proceedings.

Defendant then put in evidence a contract between himself and the American Trust Company, of which the following is a copy:

"Whereas Delos E. Culver, of Jersey City, New Jersey, is indebted unto the American Trust Company of Newark, N. J., in the sum of thirty-nine thousand six hundred and thirty-one and $\frac{29}{100}$ dollars, $39,631.29, for which indebtedness he has given said company his five certain notes or obligations, dated this day—one, $4,631.29, due June 27, '76; one, $8,750, due Aug. 27th, '76; one, $8,750, due Nov. 27th, '76; one, $8,750, due Feb'y 27th, '77, and one, $9,750, due May 27, '77—all with interest from date:

Now, therefore, the said American Trust Company hereby declares that it holds, for the benefit of said Delos E. Culver, certain choses in action, stock, and bonds, more particularly described as follows:

Chose in action against Allen, Stevens & Co.

Chose in action against Geo. Opdyke & Co. & N. Y. & O. M. R. R. Co.

Claim for 4,000 shares of the capital stock N. Y. & O. M. R. R. Co.

49 bonds of the N. Y. & O. Midland R. R. Co., Western extension.

13 bonds of the Rockland Central R. R. Co.
7 bonds of the Ridgefield Park R. R. Co.

The proceeds arising from the sale of said securities and
150 recovered from said choses in action are to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E. Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.

In witness whereof the American Trust Company has caused its treasurer to set his hand this 24th day of February, 1876, at Newark, N. J.

Witness:
JOHN McGREGOR.

W. A. WHITEHEAD, *Treasurer*."

Q. Will you now state whether that memorandum just read in evidence embodies the whole of the contract made at the time between you and the trust company or not; whether there was any other agreement besides that as to what they were going to do?

A. I understood that there were other things that they were going to do in the conversations and agreements.

By Mr. PARKER:

Q. Expressed in writing?

A. I merely made a memorandum of it going home in the cars, on the back of it, according to my understanding of it.

By Mr. CLARKE:

Q. The question is, is that memorandum (Exhibit No. 17) a complete memorandum or contract as made at the time or were there other things which the company were to do which stood in parol outside of the paper?

A. Yes, sir.

Q. That contract, aside from those other things, is a statement of the transactions, is it not?

A. Yes, sir.

151 Mr. PARKER: I object to any other things going in than as stated in the contract.

Mr. CLARKE: I submit that where the written document does not show the entire transaction we are entitled to show what the oral agreements were. The document being silent on certain parts of the agreement, we are entitled to show them.

The COURT: You can show what the circumstances were surrounding the execution of this document.

Q. State the circumstances under which that document was drawn, where it was drawn, and when and what was the occasion.

A. I drew it in *in* their office in Newark after several meetings with one or more of the gentlemen I have named, and, having a

very full understanding of what I meant to do for my part and what they were to do for their part, I drew it myself and drew it in a hurry.

Q. State the facts as to the agreement and how this document was reduced to writing and all the circumstances of it.

A. These claims were to be prosecuted by them to judgment.

Mr. PARKER: Objected.

The COURT: I will not admit testimony of any oral communication in regard to what was to be done by the trust company with this collateral security. If you have a witness to prove an independent agreement upon the part of the trust company involving the expenditure of money or the performance of things by them in regard to it, then the rule in regard to the altering, adding to, or varying a written contract is a different thing.

Q. State the facts how the agreement was entered into and where and when and with whom.

A. Entered into after negotiations at the office of the com-
152 pany, in Newark, and the consideration for renewing my indebtedness to them as to which I had received my discharge in bankruptcy was that——

Q. State what the trust company's officers agreed to do with relation to these claims in respect to the prosecution of the claims against the New York and Oswego Midland and against George Opdyke.

Mr. PARKER: I object to that as irrelevant and incompetent, not as leading.

The COURT: If the answer has relation to anything that was agreed to be done contemporaneously with the signing of the agreement or before the signing of the agreement it is excluded.

Mr. CLARKE: To that ruling of the court the defendant excepts.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. Does the answer that you would give to my question relate to anything that occurred at or before?

A. And after it. At that time and before and afterwards; it was all a part. It was intermingled in such a way that I don't see how I can separate it.

The COURT: That is excluded.

Mr. CLARKE: The defendant excepts to the ruling of the court.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether at the time this contract was made—February 24th, 1876—the trust company agreed to prosecute the claim against George Opdyke and the claim against the New York and Oswego Midland.

153 Mr. PARKER: Objected to.
The COURT: That is excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

The defendant then made the following offer of proof: The defendant offers to prove that at the time of the agreement with the American Trust Company, on February 24th, 1876, the trust company verbally agreed to prosecute the claims against George Opdyke and against the New York, Oswego and Midland railroad and to advance the expenses of such prosecution, which should be a charge against the defendant and included in his principal debt.

The defendant further offers to prove that those claims were valid claims, and that if prosecuted judgment could have been obtained upon them.

He further offers to prove that it was not within the purview of the contract that the judgment against the New York and Oswego Midland should be collected by execution, the company at the time being insolvent, and that it should be used in the reorganization proceeding then pending or sold as best might be to the interests of the parties, and that from the failure of the trust company to prosecute those claims he has been damaged to the extent of $150,000.

Mr. PARKER: Objected to as irrelevant.
The COURT: That is excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

The defendant also offers to prove that he repeatedly requested the trust company and the receiver to prosecute the claims
154 against Opdyke and the New York and Oswego Midland, and that by the running of the statute of limitations against the claim against Opdyke the same has become valueless and by the foreclosure of the New York and Oswego Midland that claim has become valueless, and that George Opdyke was during the time when that claim could have been prosecuted against him abundantly solvent and able to pay any damages up to the amount of $550,000 that might have been recovered against him.

Mr. PARKER: Objected to as irrelevant.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Defendant then put in evidence a letter from William A. Whitehead, treasurer of the American Trust Company of New Jersey, of which the following is a copy:

Daniel M. Lyon, pres't. Wm. A. Whitehead, treas.
Nathaniel Niles, vice-pres't. James V. Bentley, sec'y.

The American Trust Company of New Jersey.

NEWARK, N. J., *July 26th*, 1877.

Mr. Delos E. Culver, Jersey City.

DEAR SIR: Your letter of yesterday's date, with note for $5,428.61, has been received and I enclose the old note cancelled.

Your obligations mature as follows:

155	Aug. 2	$4,829	15
	" 25	5,331	29
	Sep. 2	4,853	94
	" 29	4,873	36
	Oct. 3	4,885	23
	Oct. 25	4,219	96
	" 29	4,901	66
	Nov. 28	5,428	61
	Dec. 3	4,938	59
		$44,261	79

To which is to be added—

1876.					
		Cost of choses in action at sale	$9	00	
Jan.	22.	Paid J. W. Culver for expenses	100	00	
Mar.	25.	" do. "	325	74	
May	16.	" G. R. Foster ac. of bonds	245	00	
1877.					
Mar.	19.	" Culver & Shoudy	100	00	
Feb'y	14.	" do.	300		
Ap.	21.	" do.	100		
					1,179 74
		Total			$45,441 53

The securities we hold are as follows:

	D. E. Culver, claim against Allen, Stephens & Company	$22,000
	D. E. Culver, claim on the N. Y. & O. Midland R. R.*y* Co. & George Opdyke for breach of contract	600,000
	D. E. Culver's claim on the N. Y. & O. Midland R. R.*y* for work performed, etc.	400,000
	49 bonds of the New York and Oswego extension bonds, $1,000 each	49,000
156	4 bonds of the Ridgefield Park R. R. *R'y* Co., $1,000 each	4,000
	6 bonds of the Ridgefield Park R. R. *R'y* Co., $500 each	3,000
	13 bonds Rockland Central r'road, $1,000 each	13,000

(End of letter).

Q. At the time this agreement of February 24, 1876, was entered

into what were the relations between yourself and Mr. McGregor and Mr. Lyon and Mr. Whitehead, with whom the contract was made? Were they friendly or otherwise?

A. Friendly.

Q. Did either of you ever consult an attorney as to whether you should draw up a contract covering the agreement?

A. I did not.

Q. Did either of them suggest such a thing?

A. No, sir.

Q. How long did it take you to draw this memorandum that you have put in evidence?

A. I guess about five minutes.

Q. And where was it done?

A. At their office, in Newark, at the time.

Q. At the time the contract was made?

A. Yes, sir.

Q. How long were you in their office altogether at the time?

A. According to my recollection I should say about an hour.

Q. Did conversation precede the drawing of this instrument?

A. It did.

Q. Was anything said after the instrument was drawn and signed?

157 Answer. I don't remember anything; I remember of making the memorandum on the agreement on going home.

Mr. CLARKE: I offer to prove that at the time this contract was entered into the trust company agreed to prosecute the claims against Opdyke and against the New York and Oswego Midland.

Admission of evidence objected to by plaintiff herein; it is irrelevant, and because it varies, adds to, alters, or contradicts the written instrument.

The COURT: That is excluded.

To which ruling the defendant, Delos E. Culver, through his cousel as aforesaid, then and there duly excepted.

I now offer the same evidence in connection with the letter of July 26, 1877.

The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

5th. That the court erred in excluding evidence offered by the defendant, Delos E. Culver, that at the time the memorandum of February 24, 1876, was entered into it was verbally agreed that the Rockland Central and Ridgefield Park bonds should either be sold or, according as the interests of the parties might dictate, that in reorganization proceedings of the respective roads then pending the trust company were to advance the assessments needed to obtain for those securities the new securities of the reorganized companies in exchange therefor when the plans for reorganization were com-

pleted, said evidence being offered after proof by defendant of the facts hereinafter stated in the manner stated.

158 The defendant proved the facts as to the making of the memorandum of February 24, 1876, as stated in the 4th assignment of errors.

The defendant then asked witness the following question:

Q. State whether at the time of the execution of this contract the trust company agreed that the 13 bonds of the Rockland Central and the 7 bonds of the Ridgefield Park and the 49 bonds of the New York and Oswego Midland should either be sold or, according as the interests of the parties might dictate, that in reorganization proceedings of the respective roads then pending the trust company were to advance the assessments needed to obtain for those securities the new securities of the reorganized companies in exchange therefor when the plans for reorganization were completed.

Mr. PARKER: That is objected to.

The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether those reorganization plans were carried out in relation to the Rockland Central and Richfield Park railroads, and whether the bonds of the Rockland Central and Ridgefield Park could have been exchanged at par for the income bonds at par of the Jersey City and Albany railway of the States of New York and New Jersey, which was the reorganized company formed by the foreclosures of the bonds of the three roads, namely, the Rockland Central, the Ridgefield Park, and the Jersey City and Albany Railroad Company, and whether the assessment needed to enable those bonds to be so exchanged upon such reorganization was not all together the sum of about $600; also whether that $600 was

159 entitled on the reorganization to the first-mortgage bonds of the Jersey City and Albany railway of New York and New Jersey; and also state whether the income bonds of the Jersey City and Albany railroad were not immediately after the reorganization of the value of from 60 to 70 cents on the dollar, and whether the value of the first-mortgage bonds covering this six-hundred-dollar assessment and received in exchange therefor were not immediately after the reorganization of the value of par.

Mr. PARKER: Objected to because it is irrelevant.

The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

Q. State whether the reorganization proceeding in the Rockland Central and Ridgefield Park matters was completed and whether, if the assessments had been paid, new bonds of the new company at par could have been obtained in exchange for the $20,000 of the Rockland Central and Ridgefield Park and whether those bonds

upon the exchange would have been worth 60 to 75 cents on the dollar.

Mr. PARKER: Objected to as irrelevant.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

The defendant then made the following offer of proof: The defendant also offers to prove that at the time of the contract, February 24, 1876, the trust company verbally agreed that in a reorganization proceeding then pending it would advance the
160 assessments, amounting to about three per cent., upon the bonds of the Rockland Central and Ridgefield Park needed to enable those bonds to be exchanged for first-mortgage income bonds of the new company; that such reorganization proceeding was completed, and that if the assessments had been paid $20,000 of the par value of the income bonds of the new company would have been obtained in exchange for the $20,000 of the Rockland Central and the Ridgefield Park Companies; that the defendant notified the trust company and its officers and requested them to pay the instalments in question, and that they neglected and refused to do so; that those income bonds immediately after reorganization were worth 75 cents on the dollar, and that the defendant has been damaged to the extent of $15,000, with interest from 1880, by the failure of the trust company to carry out this portion of the agreement.

Mr. PARKER: Objected to as irrelevant.
The COURT: Excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

6th. That the court erred in directing a verdict for the plaintiff, George Wilkinson, receiver of the American Trust Company of New Jersey, for the amount claimed in the complaint against the defendant, Delos E. Culver, and erred in taking from the jury the consideration of the issues of fact raised by the defence's set-offs and counter-claims set up in defendant's answer and supported by the evidence produced at the trial as herein summarized. The defendant, having proved the facts stated in the fourth assignment of errors above, further proved that the $39,631.29 recited in
161 the memorandum of February 24th, 1876, as the amount of the principal debt for which five (5) notes were given, was made up of his indebtedness upon the two promissory notes for $15,000 each, with interest to February 24th, 1876, each above recited (Defendant's Exhibits 15 & 16), which had been discharged in bankruptcy under his discharge, Defendant's Exhibit No. 5, together with a loan of $5,000 made at the time, February 24th, 1876, with which defendant purchased and turned over on that day to American Trust Company the 13 bonds of the Rockland Central R. R. Company and the seven bonds of the Ridgefield Park R. R.

Company, recited as held in collateral by the American Trust Company in the memorandum of February 24th, 1876.

It was further proved that the notes upon which the judgment sued upon in this action were obtained were, with the exception of five notes for $200 each, to the order of John McGregor and endorsed by him without recourse, renewals of successive renewal notes made by Delos E. Culver to the American Trust Company on the surrender of the former note or renewal and given from time to time from February 24th, 1876, to March 2nd, 1878, to the trust company, the consideration of the same being the original five notes specified in memorandum of February 24th, 1876.

That at the time the memorandum of February 24th, 1876, was signed defendant stated the facts to the officers of the trust company as to the manner in which the claims and bonds were to be made available; that his own insolvency was known to them, and the fact that the New York & Oswego Midland railroad was in the hands of a receiver; that it was agreed that he, the defendant, was to give his testimony in the suits, bring the papers, and do
162 the running back and forth to the lawyers, which he had done.

That he had offered his services in the prosecution of these claims to the trust company from time to time.

That the New York and Oswego Midland Railroad Company went into bankruptcy and a receiver was appointed in the fall of 1873, and that at the time of the memorandum, made in 1876, it was still in the hands of the receiver, Abram S. Hewitt, and that before that date the plan for reorganization was pending, of the details of which defendant had knowledge; that such plans involved the foreclosure of the first mortgage and the reorganization of the road, and that he stated the facts as to the condition of the road and the reorganization plan to the trust company's officers before the memorandum of February 24th, 1876, was entered into. The defendant then put in evidence a contract entitled articles of agreement between Delos E. Culver, of Jersey City, party of the first part, and the New York and Oswego Midland Railroad Company, by their president, party of the 2nd part, which is summarized as follows:

By said contract Culver agreed to build 73 miles of road of the said company, for which the company agreed to pay him as follows:

Three millions six hundred and seventy-six thousand six hundred dollars, $3,676,600, the same to be paid in the stock and bonds of said company and in town bonds in the manner and form and at the rates following—that is to say—

$1,460,000 in 1st-mortgage bonds of the N. Y. and O. M. R. R. at 90c.	$1,401,600
$1,625,000 in second-mortgage bonds of the N. Y. and O. M. R. R.	1,300,000
100,000 in town bonds at par	100,000
1,250,000 in N. Y. & O. M. R. R. stock at 70 cents	875,000
	3,676,600

163 Payments to be made monthly on monthly estimates, less 10% to be retained by the company as a final instalment.

The defendant further proved the following by-laws of the New York and Oswego Midland Railroad Company: The treasurer shall pay all bonds, coupons, dividends, notes, and acceptances due from the company on presentation of the proper voucher therefor. All other accounts or claims against the company shall be paid upon the order of the president or in such manner as the board may from time to time direct; also article 5, section 1, which reads as follows:

The president shall be the chief executive officer and head of the company in all its operations.

The defendant further proved that he completed the work under this contract except a small portion when the company requested him to settle the contract.

The defendant further proved that while he was going on under the contract he became entitled under its terms to the payment of $240,000 in 1st-mortgage bonds. He demanded them of the railroad company, who could not deliver them because one of the trustees under the mortgage would not sign them. There were three trustees, George Opdyke, De Wolf, and A. A. Low.

A. A. Low refused to sign. At a meeting between D. C. Littlejohn, the president of the company; George Opdyke, its financial agent, and the defendant it was agreed that if the defendant would go on with his work legal steps would be taken to make A. A. Low sign as trustee; whereupon the bonds should be delivered according to contract. D. E. Culver went on. The court compelled the
164 trustee to sign. The railroad company delivered to Culver its order on George Opdyke & Company for the bonds to the amount of $500,000. Culver demanded them from Opdyke & Company, presenting his order, who refused to deliver, Opdyke stating that he had received the bonds to sign as trustee after Low signed and had delivered them to George Opdyke & Company, in which he was a general partner, and had sold them so as to net the railroad company 92 to 92½ cents on the dollar and the proceeds credited to the railroad company.

D. E. Culver did not fully complete his contract to build the 73 miles of road, but the railroad company and himself entered into an agreement whereby he was to stop work and become a member of its board of directors, and the railroad company was to complete the work, deducting from the contract price the sum of 69,000 dollars.

After this deduction there remained due from the railroad company to D. E. Culver the sum of six hundred thousand dollars payable in first-mortgage bonds of the company and four hundred thousand dollars payable in stock of the company or one million dollars in all. Culver demanded this of the receiver, Abram S. Hewitt, who refused to pay without suit or an order of the court.

The defendant further proved that among his assets in bankruptcy which were assigned by the registrar in bankruptcy to Washington

B. Williams, his assignee, who under an order of sale duly advertised and sold the same, were the following choses of action.

Delos E. Culver's claim on the N. Y. and O. Midland Railroad Co. for work performed and materials furnished and dam-
165 ages, payable in stock to amount of $400,000.00, as set forth in his schedule.

Delos E. Culver's claim on the N. Y. & O. Midland Railroad Co. and George Opdyke, for breach of contract in not delivering the first-mortgage bonds of said railroad company to amount of $600,000.00, as set forth in his schedule.

Delos E. Culver's claim against Allen, Stephens & Co., bankers in New York, under separate names of Benjamin F. Allen, Wm. A. Stephens, and Herman Blennerhassett, for balance of account stated to be about $22,000.00, and a number of others.

And that a bill of sale was made out and delivered conveying same from Washington B. Williams, assignee, to John McGregor, a trustee of the trust company.

That suit had been begun on the claim against Allen, Stephens & Co. before his bankruptcy; that it was continued, and the trust company spent about $4,000 in prosecuting it and obtained a judgment, after a long litigation, on September 4th, 1877, for $25,000, and that thereafter the judgment debtors failed, but six thousand two hundred and fifty dollars was realized on the judgment and credited by the trust company and the receiver upon the judgment sued on herein.

Defendant further proved that he requested the trust company's officers to prosecute the claims against the New York & Oswego Midland and George Opdyke; that he requested Mr. McGregor and Mr. Whitehead to begin suit against them under his contract.

That these requests were made twice or three times after his indebtedness had been renewed under the memorandum of
166 February 24th, 1876, and before the trust company failed; but the officers had answered on the first time that they wanted to see how the claim against Allen, Stephens & Co. turned out, as it cost so much money, and at the last time Mr. Whitehead had said that he had no money; that they were hard pressed for money, and that if defendant would give them $10,000 he would turn it all over to defendant; that defendant was by profession a civil engineer; that the judgment against him consisted, first, of the old debt, then of the $5,000 with which he bought the Ridgefield Park and Rockland Central bonds, and then of five notes for $200 each, advanced at his request and given as a special counsel fee in the Allen, Stephens & Company suit; that he insisted strongly upon doing it, but the trust company did not think they ought to, but said if defendant would agree to pay these notes outside of this matter they would do it.

That the arrangement between defendant and the trust company as to the manner in which the original notes given with the collaterals and mentioned in the memorandum of February 24th, 1876, were to be paid was that they were to be paid as fast as the avails of those securities and assets of his would pay them, and if after

the recovery of the whole of them there was not money enough to pay them all, handled according to his judgment and his help and assistance, he was to pay the balance. That was the arrangement. Nothing was said then at the time about renewals of notes, because it was expected that the assets would come in early. If the Haverstraw bond matter had gone our way we would have had money right away, but when the renewals came around the
167 trust company proposed to have interest compounded. Defendant did not feel that they ought to have the compound interest. They said that all their debtors paid them interest upon the renewals if they could not pay the note for the whole amount, and defendant yielded. It was proved that the American Trust Company of New Jersey became embarrassed about the year 1878, and that in January, 1879, in insolvency proceedings in New Jersey, George Wilkinson was appointed receiver, and that from the year 1876 and after the memorandum of February 24th, 1876, nothing was done by the trust company in relation to the prosecution of the claims against the New York and Oswego Midland and the claims against the New York and Oswego Midland and George Opdyke.

It was further proved that George Opdyke, from 1873 to his death, about 1880, was worth about a million of dollars and owned real estate worth that sum; that George Opdyke was a general partner in the firm of George Opdyke & Company, as that firm existed in the years from 1871 to 1876.

CONRAD N. JORDAN, a witness for the defendant, being duly sworn, testified that he was familiar with the affairs of the New York and Oswego Midland Railway Company.

That the company was sold out under the foreclosure of a first mortgage, and he acted as chairman of the purchasing committee under the reorganization plan; that he brought in the road upon the foreclosure sale, and the company was reorganized by the purchasers.

The defendant further proved that notes and judgments against the New York and Oswego Midland R. R. Company in the years 1878, 1879, and down to the 1st day of March, 1880 (which was the last day for all claims to be presented and come in under the
168 plan of reorganization so as to obtain the benefits of that plan), sold at prices ranging from 3⅜ % on par value of principal and interest to date of exchange up to 14¼ % on par value on principal and interest to date of exchange.

It was further proved that the New York and Oswego Midland R. R. Company made, executed, and delivered on the 1st day of July, 1869, a first mortgage of all its property and franchises to Abiel A. Low, George Opdyke, and Delos Dewolf, as trustees, to secure an issue of eight million of bonds of the company.

(The first-mortgage bonds under Defendant's Exhibit No. 19, agreed to be paid by the company to Delos E. Culver, were a part of this issue.)

That in the fall of 1873 the company became embarrassed and made default under that mortgage.

Thereupon a bill to foreclose the same was filed in the United States circuit court for the southern district of New York on the 13th day of November, 1873, and Abram S. Hewitt was appointed receiver of the said railroad, and the road remained in the hands of a receiver until sale of said road under a decree foreclosing said mortgage in 1880.

The foreclosure suit above referred to resulted in the entry of a final decree therein on the 2nd day of October, 1876, that the road and all its property and franchises be sold within sixty days and all persons barred of any equity or claim therein unless the said railroad or said other parties paid into court the sum of nine million nine hundred and seventy-six thousand and twenty-three dollars in gold coin, and also the further sum of two hundred and forty-five thousand seven hundred and sixty-five $\frac{22}{100}$ dollars in money
169 and interest from July 2, 1876, adjudged to be due under said mortgage to the holders of bonds issued under and secured thereby, and also counsel fees, expenses of suit, and receiver's certificates.

Under this decree all the property and franchises of the said railroad were duly advertised and sold by Kenneth G. White, master, at public auction, on the 14th day of November, 1879, to Conrad N. Jordan for the sum of four million six hundred thousand dollars.

The master filed his report of said sale in said court December 5th, 1879, and said report and sale were duly confirmed by an order of said court made January 6th, 1880, directing confirmation, and that the master make, execute, and deliver a proper deed to the said purchaser, which was done at said last-mentioned date.

The said Conrad N. Jordan, in buying in said road at said sale, acted for a purchasing committee of certain of the holders of bonds and securities of the road under a plan of reorganization.

After the sale the said parties formed a new company, the New York, Ontario and Western Railroad Company, to which said Jordan assigned the property and franchises brought in.

The reorganization plan was of the inside kind and had been promulgated long before. Under it creditors, stockholders, and the holders of first and other mortgage bonds and securities of the New York and Oswego Midland Railroad Company were to withdraw opposition to judgment in the foreclosure suit and to pool their property and claims with a purchasing committee. The foreclosure suit was then to be pushed to final judgment and sale
170 and the purchasing committee were to purchase the same, paying therefore cash and outstanding bonds pooled with them. Thereupon a new company was to be formed, to which the property purchased was to be assigned and new stock of that company was to be issued, together with a new mortgage, and the holders of the different classes of property thus pooled with the committee were, by paying certain assessments, to receive certain amount of the stock or bonds or other securities of the new company in exchange for the different securities of the old company held by them, according to the scale of values, prices, and assessments, for the ex-

change of the old for the new securities fixed by the plan of reorganization, and that by such foreclosure sale and reorganization the floating debts and claim against the New York and Oswego R. R. C. had become valueless, including the choses in action mentioned in the memorandum of February 24th, 1876.

The defendant further proved that Mr. Whitehead was the treasurer of the American Trust Company of New Jersey at the time of the arrangement between that company and the defendant; that John McGregor was a director of the same at this time and D. M. Lyon was president and director.

Thereupon Mr. Clarke, on behalf of the defendant, proposed to sum up the case.

The defendant's counsel claimed that the contract in evidence meant that the trust company were to prosecute claims and sell collaterals in a reasonable time.

The court interrupted him, saying, "I have already stated my idea of the legal character of this contract, that there was no obligation on the part of the trust company to sell the stocks and
171 bonds except upon a request of the pledgor.

And there was no obligation to prosecute the claims to suit at their own expense, although such prosecution might have been requested by the pledgor, and that there is no evidence that there was any request to sell the securities, and there is no evidence of what the law calls negligence on the part of the trust company." Defendant excepted to each branch of this ruling.

Mr. CLARKE: We ask to have the question go to the jury as to the damages arising from the negligence of the trust company under our construction of this contract. We ask that that question be left to the jury and we except to the ruling which excludes it.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

We also ask to go to the jury on the point that the contract is ambiguous and that the jury must view it as to who was to pay the expenses of the transaction, the trust company or Culver, and we think that that question must be determined on the circumstances of the case as the facts have been disclosed. On this theory of the law and on this contract we request the court to let the case go to the jury.

The COURT: I see no question of fact for the jury.

Mr. CLARKE: We except to that ruling of the court — manner and form of the foregoing exceptions.

We also desire to note an exception to each specific clause of the judge's decision upon the question as to the meaning of the contract.

172 The COURT: Gentlemen of the jury, you are directed to render a verdict in favor of the plaintiff in the sum of $76,659.96.

The defendant duly excepted to the direction of a verdict in favor of the plaintiff.

The jury returned a verdict for the plaintiff under the foregoing instructions of the court.

7th. That the court erred in ruling that the legal effect of the memorandum of February 24th, 1876, under the facts proved as set out in the 4th and 6th assignments of errors, was that there was no obligation on the part of the trust company to sell the stocks and bonds except upon the request of the pledgor.

8th. That the court erred in ruling that the legal effect of the memorandum of February 24th, 1876, under the facts proved as set out in the 4th and 6th assignment of errors, was that there was no obligation on the trust company to prosecute the claims to suit at their own expense, although such prosecution might have been requested by the pledgor.

9th. That the court erred in ruling that under the memorandum of February 24th, 1876, and the fact proved by defendant more specifically set out in the 4th and 6th assignment of errors that there was no evidence of what the law calls negligence on the part of the trust company.

10th. That the court erred in refusing the request of defendant's counsel to go to the jury as to the damages arising from the negligence of the trust company under defendant's construction of the contract, viz., that the trust company were to prosecute claims
173 and sell collaterals within a reasonable time, especially after the request proved to prosecute the collateral choses in action.

11th. That the court erred in excluding the defendant from putting in evidence, in proof of the market value at New York city of the notes, judgments, and bonds of the New York and Oswego Midland Railroad Company, on January 21st, 1880, a written contract of purchase of sale of the same, made between defendant and Walter S. Gurnee, for $100,000 of said securities.

12th. That the court erred in excluding the defendant, under the facts proved and more fully set out in the 4th and 6th assignment of errors, from putting in evidence the following testimony:

By Mr. CLARKE:

Q. What was the value of the Ridgefield Park and Rockland Central bonds from the time of the making of this agreement up to about the year 1880?

Mr. PARKER: I object to that as irrelevant.

Mr. CLARKE: That is a step in the chain of evidence. We shall show that the Ridgefield Park mortgage was foreclosed, and that the securities held in the hands of the trust company became valueless by that foreclosure. We shall show that this loss of value occurred during this period, and that the bonds became valueless as soon as that reorganization proceeding resulted in a sale and reorganization of the company. We want to show that the mortgages on these roads, securing the bonds in question, were foreclosed and finally resulted in a sale under foreclosure in the year 1880, and

that the securities became valueless after the reorganization.
174 We want to show that prior to that time the securities were valuable, and that the trust Co. and the receiver had notice of these proceedings, and that unless something was done with them they would become valueless by foreclosure, and that the trust Co. failed to act in any way upon the securities. We wish to show that they were notified of the last day on which the opportunity could be availed of upon a reorganization; that that was some time in the spring-time of 1880.

They were notified that the foreclosure would be completed, which foreclosure would wipe out these bonds, in the spring of 1880.

The COURT: Do you wish to show that the trust company and the receiver were notified at the last day that the reorganization was affected and that foreclosure would wipe out the bonds?

Mr. CLARKE: That is it.

Evidence excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

And the said Delos E. Culver, by his counsel as aforesaid, prays that the judgment aforesaid, for the errors aforesaid and for the errors in the said record and proceedings being, may be reversed and annulled and altogether holden for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment, and he will ever so pray.

(S'g'd) R. FLOYD CLARKE,
Attorney for Plaintiff in Error.

(S'g'd) R. FLOYD CLARKE, *Of Counsel.*

175 (Endorsed:) Supreme Court of the United States. October term, 1888. Delos E. Culver, plaintiff in error, *vs.* George Wilkinson, receiver of the American Trust Company of New Jersey, defendant in error. Assignment of errors. R. Floyd Clarke, attorney for plaintiff in error, No. 146 Broadway, New York, N. Y. Due service of copy of assignment of errors is hereby admitted. 27th day of August, 1888. (S'g'd) Edgar P. Hill, att'y for def't in error. (File-mark:) U. S. circuit court. Filed Aug. 23, 1888. John A. Shields, clerk.

175½ Supreme Court of the United States.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Plaintiff & Def't in Error,
vs.
DELOS E. CULVER, Defendant and Plaintiff in Error.
} Joinder in Error.

And afterwards, to wit, on the — Monday of October in said term, the said defendant in error, by Edgar P. Hill, his attorney, comes

The jury returned a verdict for the plaintiff under the foregoing instructions of the court.

7th. That the court erred in ruling that the legal effect of the memorandum of February 24th, 1876, under the facts proved as set out in the 4th and 6th assignments of errors, was that there was no obligation on the part of the trust company to sell the stocks and bonds except upon the request of the pledgor.

8th. That the court erred in ruling that the legal effect of the memorandum of February 24th, 1876, under the facts proved as set out in the 4th and 6th assignment of errors, was that there was no obligation on the trust company to prosecute the claims to suit at their own expense, although such prosecution might have been requested by the pledgor.

9th. That the court erred in ruling that under the memorandum of February 24th, 1876, and the fact proved by defendant more specifically set out in the 4th and 6th assignment of errors that there was no evidence of what the law calls negligence on the part of the trust company.

10th. That the court erred in refusing the request of defendant's counsel to go to the jury as to the damages arising from the negligence of the trust company under defendant's construction of the contract, viz., that the trust company were to prosecute claims
173 and sell collaterals within a reasonable time, especially after the request proved to prosecute the collateral choses in action.

11th. That the court erred in excluding the defendant from putting in evidence, in proof of the market value at New York city of the notes, judgments, and bonds of the New York and Oswego Midland Railroad Company, on January 21st, 1880, a written contract of purchase of sale of the same, made between defendant and Walter S. Gurnee, for $100,000 of said securities.

12th. That the court erred in excluding the defendant, under the facts proved and more fully set out in the 4th and 6th assignment of errors, from putting in evidence the following testimony:

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that the securities became valueless after the reorganization.
174 We want to show that prior to that time the securities were valuable, and that the trust Co. and the receiver had notice of these proceedings, and that unless something was done with them they would become valueless by foreclosure, and that the trust Co. failed to act in any way upon the securities. We wish to show that they were notified of the last day on which the opportunity could be availed of upon a reorganization; that that was some time in the spring-time of 1880.

They were notified that the foreclosure would be completed, which foreclosure would wipe out these bonds, in the spring of 1880.

The COURT: Do you wish to show that the trust company and the receiver were notified at the last day that the reorganization was affected and that foreclosure would wipe out the bonds?

Mr. CLARKE: That is it.

Evidence excluded.

To which ruling the defendant, Delos E. Culver, through his counsel as aforesaid, then and there duly excepted.

And the said Delos E. Culver, by his counsel as aforesaid, prays that the judgment aforesaid, for the errors aforesaid and for the errors in the said record and proceedings being, may be reversed and annulled and altogether holden for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment, and he will ever so pray.

(S'g'd) R. FLOYD CLARKE,
Attorney for Plaintiff in Error.

(S'g'd) R. FLOYD CLARKE, *Of Counsel.*

175 (Endorsed:) Supreme Court of the United States. October term, 1888. Delos E. Culver, plaintiff in error, *vs.* George Wilkinson, receiver of the American Trust Company of New Jersey, defendant in error. Assignment of errors. R. Floyd Clarke, attorney for plaintiff in error, No. 146 Broadway, New York, N. Y. Due service of copy of assignment of errors is hereby admitted. 27th day of August, 1888. (S'g'd) Edgar P. Hill, att'y for def't in error. (File-mark:) U. S. circuit court. Filed Aug. 23, 1888. John A. Shields, clerk.

175½ Supreme Court of the United States.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Plaintiff & Def't in Error,
vs.
DELOS E. CULVER, Defendant and Plaintiff in Error.
} Joinder in Error.

And afterwards, to wit, on the — Monday of October in said term, the said defendant in error, by Edgar P. Hill, his attorney, comes

here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

(S'g'd) EDGAR P. HILL,
Attorney for Defendant in Error.

New York, Sept. 14th, 1888.

176 (Endorsed:) United States Supreme Court. George Wilkinson, receiver of the American Trust Company of New Jersey, plaintiff and defendant in error, *vs.* Delos E. Culver, defendant and plaintiff in error. Joinder in error. Edgar P. Hill, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 14th day of Sept., 1888. (S'g'd) R. Floyd Clarke, attorney for defendant and plaintiff in error. To R. Floyd Clarke, Esq., attorney for defendant and plaintiff in error. (File-mark:) U. S. circuit court. Filed Sept. 14, 1888. John A. Shields, clerk.

177 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey, Plaintiff and Defendant in Error,
vs.
DELOS E. CULVER, Defendant and Plaintiff in Error.
} Bond for Costs.

Know all men by these presents that we, Delos E. Culver, as principal, of 41 West 37th street, New York, N. Y., and Robert Dunlap, as surety, of 314 West 23d street, New York, N. Y., and Weeks W. Culver, as surety, of 496 Third street, Brooklyn, Kings county, New York, are held and firmly bound unto the above-named George Wilkinson, receiver, in the sum of five hundred dollars, to be paid to the said George Wilkinson, receiver; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named Delos E. Culver has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Delos E. Culver shall prosecute said writ of error to

effect and answer all costs if he, said Delos E. Culver, fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DELOS E. CULVER. [L. S.]
ROBT DUNLAP. [L. S.]
WEEKS W. CULVER. [L. S.]

Sealed and delivered and taken and acknowledged this 23d day of Ap'l, 1888, before me—

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

178 [Endorsed:] U. S. circuit court, southern district of New York. George Wilkinson, receiver, pl'ff and def't in error, *vs.* Delos E. Culver, defendant and pl'ff in error. Bond for costs on writ of error. The within bond is approved as to form and the sufficiency of the sureties therein, 30th day of Ap'l, 1888. E. Henry Lacombe. R. Floyd Clarke, att'y for def't & pl'ff in error. U. S. circuit court. Filed Ap'l 30th, 1888. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } *ss:*

Robert Dunlap, surety, and Weeks W. Culver, surety, being duly sworn, deposes and says, each for himself, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

ROBT DUNLAP.
WEEKS W. CULVER.

Sworn to this 23d day of Ap'l, A. D. 1888, before me—

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

179 UNITED STATES OF AMERICA, *ss:*

To George Wilkinson, receiver of the American Trust Company of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, in the second circuit, wherein Delos E. Culver is plaintiff in error and you, George Wilkinson, receiver of the American Trust Company of New Jersey, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the southern district of New York, in

the second circuit, this 30th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

E. HENRY LACOMBE.

180 [Endorsed:] United States Supreme C't. Delos E. Culver, plaintiff in error, *vs.* George Wilkinson, receiver of the American Trust Company of New Jersey, defendant in error. Citation. Service of the within citation is hereby admitted 2d day of May, 1888. Edgar P. Hill, att'y for def't in error. R. Floyd Clarke, attorney for pl'ff in error, No. 146 Broadway, New York, N. Y. U. S. circuit court. Filed May 17, 1888. John A. Shields, clerk.

Endorsed on cover: Case No. 13289. S. New York C. C. U. S. No. 228. Delos E. Culver, plaintiff in error, *vs.* George Wilkinson, receiver of the American Trust Company of New Jersey. Filed October 13, 1888.

Office Supreme Court U. S.
FILED,
APR 19 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 228.

DELOS E. CULVER,

Plaintiff in Error,

against

GEORGE WILKINSON, Receiver of the AMERICAN TRUST COMPANY OF NEW JERSEY,

Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR

BY

R. FLOYD CLARKE.

C. G. Burgoyne, Cor. Walker and Centre Sts., N. Y.

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A. It is a cardinal rule that a writing contains all that may fairly be implied from it, pp. 112–119.

C. The words "subject to repayment" have a clear

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5th. The Receiver takes the notes and the judgment subject to all the equities existing in favor of the defendant, pp. 165–167.

6th. It was the Receiver's duty to carry out the contract of the trust company as to these collaterals if he elected to accept the notes and the judgment on them, pp. 167–169.

A. It is no defense that he was a New Jersey Receiver and the defendants were out of the State of his appointment, pp. 167–168.

B. Mere insolvency, suspension and appointment of Receiver does not work a dissolution of the corporation; it is not dissolved until a judgment of dissolution, p. 168.

C. He cannot defend on the ground he had no notice of the contract, etc. Culver offered to prove notice to him, and requests on him, as Receiver, to prosecute (Rec., p. 42, fol. 85), p. 168.

7th. The trust company and the Receiver were bound to carry out their contract to prosecute claims,

although the expense would exceed the value of the property transferred to them, p. 169.

8th. The cross-claims in question are legal causes of action, pp. 169–170.

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APPENDIX A (pp. 172–193).

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Supreme Court of the United States,

OCTOBER TERM, 1891. No. 228.

DELOS E. CULVER,
Plaintiff in Error,

AGAINST

GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

George Wilkinson, Receiver of the American Trust Company of New Jersey, sued *Delos E. Culver* in the Circuit Court of the United States for the Southern District of New York upon a judgment recovered May 31, 1879, by said George Wilkinson as Receiver, &c., against said Delos E. Culver in the Supreme Court of the State of New Jersey for fifty-four thousand two hundred and sixty-three and $\frac{33}{100}$ ($54,263.33) dollars *(Record, p. 18, fol. 34)*.

Culver, the plaintiff in error here, but defendant below, answered said suit by setting up, under pleas of payment *(Record, p. 22, fol. 43)*, set-off *(Rec., pp. 22 to 32)* and counterclaim *(Rec., p. 32, fol. 63)*, damages arising out of negligence on the part of the plaintiff and the company of which he is the Receiver, in failing to prosecute certain choses in action pledged as collateral and in failing to perform a contract made between said American Trust Company and said Culver in relation to certain securities and choses in action held as collateral to the debt upon which such judgment was recovered; and damages arising from the conversion by them of such collaterals.

Upon the trial defendant produced evidence in support of these set-offs and counterclaims; but, at the close of the case, the Court directed a verdict for the plaintiff for $76,659.96, the amount of the judgment and interest *(Rec., p. 76, fol. 144)*. To this the defendant duly excepted and thereupon sued out this writ of error *(Rec., p. 75, fol. 144, and Rec., p. 76, fol. 144)*.

Twelve errors are assigned by the plaintiff in error as cause for reversal (Rec. pp. 77–93); but, since some of them depend upon the sole legal issue, they resolve themselves into only seven issues of law to be considered on this appeal. These issues arise upon exceptions taken to the exclusion of oral evidence offered in the course of the trial, and to the direction of a verdict for the plaintiff, and refusal of defendant's request to be allowed to go to the jury.

The facts actually proved by the defendant below, the plaintiff in error here, upon the trial of the case constitute only a small portion of the actual facts in the case. The Court ruled out a large amount of evi-

dence on which rulings error is here assigned; and it will conduce to the better understanding of the case to state the facts therein as they actually occurred. The following statement of the facts includes therefore the facts actually proved by the plaintiff in error below together with some of the facts offered to be proved but excluded. All the facts claimed to have actually existed are necessary to a true appreciation of the issues of law involved upon this writ of error.

After such statement the facts which were ruled out of evidence will then be recited.

The facts of the case are briefly these:

The plaintiff in error, Delos E. Culver, was, at the times hereinafter mentioned, a civil engineer and contractor, engaged in large railroad operations, and the American Trust Company of New Jersey was a financial institution and trust company of that State located at Newark, New Jersey. In August, 1873, Delos E. Culver borrowed from the American Trust Company of New Jersey, $30,000, giving two promissory notes for $15,000 each, payable in four months, and depositing as collateral forty-nine bonds of the New York and Oswego Midland Railroad Company, first mortgage western extension, amounting to $48,000 at par, twenty-four one thousand dollar bonds being deposited as collateral on one note, and twenty-five one thousand dollar bonds being deposited as collateral on the other *(Rec., pp. 37, 38, fols. 74-76).*

The notes were not paid when due; but, on the 23d day of September, 1873, a proceeding against Culver in involuntary bankruptcy was begun by a petition filed by a creditor named Hatch, in the United States

District Court for the District of New Jersey (*Rec., p. 38, fol. 76*).

Thereupon Washington B. Williams was appointed Receiver in Bankruptcy of D. E. Culver; and, on the 1st day of December, 1874, D. E. Culver was, by a decree of the United States District Court for the District of New Jersey, discharged in bankruptcy from all debts by the bankruptcy act provable against his estate which existed on the 23d day of Septemper, 1873 (*Rec., p. 38, fol. 76*).

By this decree Culver was discharged from all liability on the two notes for $15,000 each, given to the American Trust Company above recited (*Rec., p. 42, fol. 91*).

At this time the situation of the parties was as follows: Delos E. Culver was a bankrupt and his debt to the American Trust Company of New Jersey had been discharged in bankruptcy. Among his assets in bankruptcy were a large number of *choses in action*, including the three hereinafter mentioned, consisting of claims against persons and corporations arising out of his building and financial operations. Some of these claims were disputed and all needed his personal knowiege of the facts, supervision, attendance, personal attention and care to make them available; and further, those in dispute needed a large amount of cash, which neither he nor his assignee in bankruptcy was in a situation to furnish, in order to render them available by suit. Culver alone knew the value and validity of these claims; he alone was familiar with the facts, the transactions and the documents; and he was insolvent and unable to raise the money required to pro-

secute them to a termination which might render them valuable. As a man of business ability and far-sightedness, he at once set to work to get these claims into a position where they could be rendered available, both to pay his creditors and to realize something for himself.

Among these assets of D. E. Culver in bankruptcy, assigned by the Registrar to the assignee Washington B. Williams, were three choses in action as follows: "Delos E. Culver's claim on the New York and Oswego Midland Railroad Company for work performed and materials furnished and damages payable in stock to the amount of $400,000 as set forth in his schedule.

"Delos E. Culver's claim on the New York and Oswego Midland Railroad Company and George Opdyke for breach of contract in not delivering the first mortgage bonds of said railroad company to amount of $600,000 as set forth in his schedule.

"Delos E. Culver's claim against Allen Stephens & Co., bankers in New York, under separate names of Benjamin F. Allen, William A. Stephens, and Herman Blennerhassett, for balance of account stated to be about $22,000" *(Rec., p. 58, fol. 111).*

The New York and Oswego Midland Railroad Company had itself defaulted in paying the interest on its first mortgage in the fall of 1873. A bill to foreclose this mortgage was filed, and Abram S. Hewitt appointed Receiver in November, 1873, and the road remained in his hands as Receiver until 1880 *(Rec., p. 73, fol. 139).*

At the time of the memorandum of February 24th, 1876, hereinafter mentioned, George Opdyke was solvent and in good standing; and such was the case with Allen, Stephens & Co. Culver had been connected with

the New York and Oswego Midland Railroad Company since 1871; and was familiar with the nature and value of the property, the condition of the company, and the nature and terms of the reorganization plan then pending under the foreclosure suit, instituted to foreclose its first mortgage, whereby holders of bonds, stock and judgments would be entitled, on coming in under the reorganization plan and paying certain assessments, to securities in the reorganized company intended to be formed; and that, by reason of this pending reorganization plan, the old securities would have value in the market. In full view of these facts, and an approaching sale of these choses in action by the assignee in bankruptcy, Culver made arrangements to purchase them in, and then transfer them to his creditor the American Loan and Trust Company, upon the understanding that he would then renew the debt discharged in bankruptcy upon their taking title to these collaterals and advancing the moneys necessary to prosecute them to judgment, and then dealing with them in such way as would result to the best interest of the parties interested. These choses in action amounting to one million and twenty-two thousand ($1,022,000) dollars at par, were sold at public auction by the assignee in bankruptcy of Delos E. Culver, pursuant to the order of the Court, on October 21, 1875, and were bought by Delos E. Culver for the sum of $9, in the name of John McGregor, one of the directors of the American Trust Company (*Rec., pp. 57, 58, fols. 11–119*).

In the meantime Delos E. Culver had become an officer of and interested in the Jersey City and Albany Railroad Company, which was the successor of the

Rockland Central Railroad Company and Ridgefield Park Railroad Company, and had become familiar with the reorganization plan of said road then pending, whereby the three railroads should be foreclosed and reorganized into the Jersey City and Albany Railway Company of New York and New Jersey. Pending, and as a result of such reorganization, bonds of the Ridgefield Park and Rockland Central Railroad Companies which were then selling at a low price, he deemed would become very valuable when exchanged into bonds of the new company under such reorganization. With this end in view, Culver laid before the officers of the trust company, John McGregor and Daniel M. Lyon, his plan, as follows:

Culver proposed that the Trust Company should loan to the defendant a further sum of $5,000 for the sole and only purpose of purchasing $13,000 of Rockland Central Railroad bonds and $7,000 of Ridgefield Park Railroad bonds (Rec., p. 47, fol. 91).

Culver thereupon agreeing to renew the whole of the said discharged indebtedness of $30,000 and to become liable for the said $5,000, the said company agreeing to make said advance, and, if this defendant was not able to do it, pay the necessary assessment of three per cent. on the said Ridgfield Park and Rockland Central securities which had by consolidation become securities of the Jersey City and Albany Railroad Company to enable that company to be reorganized and to obtain thereon the new securities of said new reorganized company, this assessment to be paid by said trust company and charged finally to the defendant on account; the said company also to proceed and take action for the collec-

tion of said claims against Allen, Stephens & Co., George Opdyke & Co., and the New York and Oswego Midland Railroad Company, and also of the claim for four thousand shares of the capital stock of the New York and Oswego Midland Railroad Company, crediting Culver with all receipts and charging him with expenses, Culver to give his time, services and knowledge in that behalf free of charge (*Rec., p. 48, fol. 93*).

It was a part of the plan of reorganization of the Jersey City and Albany Railroad Company that the old securities in which the defendant proposed such investment should be subject to such assessment, and that on reorganization new first mortgage bonds of the reorganized company should be given in exchange for said old first mortgage bonds of the same amount, which would be of great value as compared with the price for which the old bonds could be bought (*Rec., pp. 41, 42, fols. 82, 83, 84*).

The American Trust Company, by its officers, accepted this proposal of the defendant and agreed to all of its terms.

It was in view of these facts and under these surrounding circumstances that Culver communicated with the officers of the Trust Company, showing them his contracts and explaining how he could recover judgments against the New York and Oswego Midland Railroad Company certainly, and probably George Opdyke as well (*Rec., p. 48, fol. 93*).

Culver also stated the facts as to the condition of the New York and Oswego Midland road and the reorganization plan pending (*Rec., p. 49, fol. 95*), and discussed with them the way in which securities of the

Ridgefield Park and Rockland Central road could be made valuable by paying small percentages under a reorganization plan of the Jersey City and Albany Railroad then pending against which the first two were first liens and obtaining securities of the proposed new railroad company in exchange *(Rec., p. 48, fol. 93)* and a similar plan to be carried out as to the western extension bonds. During all this time John McGregor, Daniel M. Lyon and William A. Whitehead, directors and officers of the American Trust Company, were on friendly terms with Culver, and as a result of the negotiations which had been pending between them, they all met on February 24th, 1876, at the office of the trust company in Newark *(Rec., p. 44, fol. 87)*.

Note that the negotiations resulting in the memorandum occured before, at and after it was made, thus:

"Q. Does the answer that you would give to my question relate to anything that occurred at or before?" (the memorandum of February 24th, 1876).

"A. And after it; at that time and before and afterward; it was all a part. It is intermingled in such a way that I don't see how I can separate it" *(Rec., p. 40, fol. 81)*.

Then and there the whole matter was gone over between them, and D. E. Culver renewed his debt discharged in bankruptcy by giving new notes for $34,631.29, being the principal sum of $30,000, plus interest to that date, and a new note for the $5,000 which had been borrowed for the express purpose of purchasing the thirteen thousand of Rockland Central, and seven thousand of Ridgfield Park bonds, and in consideration of this renewal the American Trust Company

through its officers then agreed to prosecute the claims against Allen, Stephens & Co., George Opdyke & Co., and the New York and Oswego Midland Railroad Company.

It was further agreed that the collaterals so held for the payment of such renewed indebtedness should be rendered available in the following manner :

Claims against Allen, Stephens & Co., and George Opdyke and the New York and Oswego Midland Railroad Company should be prosecuted to judgment and collection, the trust company advancing the necessary expenses. As the New York and Oswego Midland Railroad Company was in the hands of a Receiver pending foreclosure of its first mortgage bonds, the parties did not expect to collect the judgment against it by execution, but in view of such reorganization plan pending were to sell it in the open market or use it to come in under the organization plan, the trust company advancing the necessary assessment.

The thirteen thousand of Rockland Central and seven thousand of Ridgefield Park Railroad bonds were to be sold in the market on advance in price pending reorganization or as the interest of the parties might dictate. The trust company were to advance the necessary assessment under the reorganization plan and exchange the same for securities of the new company.

The parties having agreed upon this complicated arrangement, without consulting any attorney, Culver drew himself, in his own handwriting *(Rec. p. 44, fol. 87)*, an informal paper reciting the collaterals and a part of this contract of which the following is a copy :

" Whereas Delos E. Culver, of Jersey City, New Jersey, is indebted unto the American

Trust Company of Newark, N. J., in the sum of thirty-nine thousand six hundred and thirty-one $\frac{29}{100}$ dollars ($39,631.29) for which indebtedness he has given said company his five certain notes or obligations, dated this day: one $4,631.29, due June 27, '76; one $8,750, due August 27th, '76; one $8,750, due November 27th, '76; one $8,750, due February 27th, '77; and one $8,750, due May 27th, '77, all with interest from date.

Now, therefore, the American Trust Company hereby declares, that it holds for the benefit of Delos E. Culver certain choses in action, stock and bonds, more particularly described as follows:

Chose in action against Allen Stevens & Co.

Chose in action against Geo. Opdyke & Co. and N. Y. & O. M. R. R. Co.

Claim for 4,000 shares of the capital stock N. Y. & O. M. R. R. Co.

49 bonds of the N. Y. & O. Midland R. R. Co. Western Extension.

13 bonds of the Rockland Central R. R. Co.

7 bonds of the Ridgefield Park R. R. Co.

The proceeds arising from the sale of said securities and recovered from said choses in action are to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E. Culver or his legal representatives subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.

In witness whereof, the American Trust Company has caused its treasurer to set his hand this 24th day of February, 1876, at Newark, N. J.

W. A. WHITEHEAD,
Treasurer.

Witness:
JOHN MCGREGOR."

(Rec., pp. 38–39, fols. 77–79.)

The consideration of the indebtedness of $39,631.29, recited in this memorandum as the amount of the principal debt for which five notes were given, was the moral indebtedness of Culver to the trust company upon the two promissory notes for $15,000 each given

in August, 1873, which had been discharged in bankruptcy, plus the interest on the same, amounting to $34,631.29, together with a loan of $5,000 made at the time for the purpose of Culver's purchasing thirteen bonds of the Rockland Central R. R. Co. and seven bonds of the Ridgefield Park R. R. Co., recited therein as held as collateral. Culver purchased the bonds at twenty-five cents on the dollar with this money and delivered them to the trust company to hold as part of the collateral (*Rec., p. 47, fol. 91*).

Said notes for the renewal of said old discharged indebtedness and for said new loan were made payable by their terms in a few months after date, and were from time to time thereafter, as they fell due, renewed by the defendant giving new notes for the amounts thereby secured with interest; and said renewal notes have themselves been renewed, such renewals extending from time to time the payment of the sum with interest, secured by the original notes, down to shortly before the time of the institution in the Supreme Court of New Jersey of the action mentioned in the complaint herein (Rec., pp. 25, 26, fols. 49–52).

As showing the incompleteness of this memorandum attention may be called to the fact that it does not recite the true consideration. It speaks merely of the indebtedness, and does not specify the transaction, or from what such indebtedness arose, namely, the renewal of the old debt discharged in bankruptcy, plus the new loan of $5,000, made for the specific purpose of a joint investment in the Ridgefield Park and Rockland Central bonds, facts which were properly proved outside of the memorandum. Nor does the memorandum specify further portions of

the entire contract which were to be performed by D. E. Culver, and which were also properly proved outside of the memorandum, namely, that Culver was to give his time for nothing, as much as should be required, and get the testimony and papers, and do the running backwards and forwards to the lawyers who were prosecuting the suits, and prove all the contracts and all the papers and obtain the attendance of all the witnesses whose services were required, or the use of which would be necessary to collect these judgments (*Rec., p. 48, fol. 94*).

And as above stated, and as shown by the subsequent action of the trust company thereunder, such memorandum fails to state all the covenants entered into on the part of the trust company in relation to these collaterals.

The plaintiff *in error* further proved that the *choses in action* mentioned in that receipt were each of them good and valid claims, and that judgment for its par value was obtained on one, and that if the other two had been prosecuted judgment could have been obtained upon them for their par value. That a judgment against George Opdyke would have been good for the par value, and a judgment against the New York and Oswego Midland Railroad Company was worth, in the open market, from five to fifteen cents on the dollar pending the reorganization plan (Record, p. 59, fol. 113; p. 72, fol. 137).

That the said claims arose out of the following facts respectively:

First. The claim against Allen, Stevens & Co. for $22,000, on which judgment was obtained for $25,000,

was a claim arising out of an alleged balance of account due from them to Culver on their sales as his brokers of stocks and bonds (*Rec., p. 61, fol. 116*).

Suit had been begun on this claim prior to the bankruptcy of Culver, and said suit was pending at the time of the agreement of February 24th, 1876.

SECOND. The claim against the New York and Oswego Midland Railroad Company was for $400,000 in stock and $600,000 in first mortgage bonds, a balance due and agreed to be paid by reason of Culver's performance of a building contract for the building of about seventy three miles of the New York and Oswego Midland Railroad in the centre of the road. It arose out of the following facts:

The defendant Culver is by profession a civil engineer (*Rec., p. 60, fol. 116*), and, prior to the time of obtaining the loan of thirty thousand dollars from the American Trust Company of New Jersey, was engaged as a contractor in the building of about seventy-three miles of the New York and Oswego Midland Railroad under a contract, set out on pages 49–51, folios 96–100 of the Record, whereby he was to receive payments in installments as the work progressed to the amount of three million six hundred and seventy-six thousand ($3,676,000) dollars in first mortgage bonds, second mortgage bonds, town bonds and stock of the road.

Culver completed this work, with the exception of about $70,000 worth of work, when, by arrangement between himself and the company, made on the 31st day of December, 1872, it was arranged that the company should finish the work, deducting from the con-

tract price $69,000 (Rec., pp. 53–55, fols. 103–107; p. 57, fols. 109–111), and Culver should become one of the directors of the company. Dewitt C. Littlejohn, the former president of the company, testifies thus: "Afterwards we found it became necessary to avail ourselves of Mr. Culver's financial experience and large acquaintance in the city, and we terminated his contract by the road agreeing to complete what was unfinished, and he deducting from the contract price certain amounts."

At the time such arrangements were made as to the closing of the contract there was due from the company to Delos E. Culver $400,000 in stock of the New York and Oswego Midland Railroad and $600,000 in first mortgage bonds of the said railroad (Rec., p. 58, fol. 112; p. 38, fol. 78; p. 44, fol. 87; p. 56, fol. 108).

Shortly afterwards, in 1873, the New York and Oswego Midland Railroad became insolvent, defaulted on its first mortgage, a foreclosure suit was begun, and Abram S. Hewitt was appointed Receiver *(Rec., p. 74, fol. 139)*.

Culver demanded from him the stock, but was told he must sue or apply to the Court *(Rec., p. 57, fol. 109)*.

THIRD. The claim against the New York and Oswego Midland Railroad Company and George Opdyke for $600,000 of first mortgage bonds was, in the alternative, a claim against either separately, or both, and arose out of the following facts:

Pending performance by Culver of his building contract above referred to, he became entitled at two separate times to payments of installments of first mort-

gage bonds of the road amounting to about $500,000 (*Rec., pp. 52–53, fols. 100–103*).

The mortgage under which the bonds were issued had been made by the railroad company to Abiel A. Low, George Opdyke and Delos DeWolfe, as trustees (*Rec., p. 73, fol. 139*).

Mr. Lowe declined to sign the bonds for some technical reason. Littlejohn, who was the president, and George Opdyke, of the firm of Geo. Opdyke & Co., who were the financial agents of the railroad company, asked Culver to go on with the work, under the assurance that they would compel the trustee to sign by legal proceedings, and that the moment the bonds were obtained they should be delivered to Culver according to contract (*Rec., p. 52, fol. 101*).

Culver went on under this promise and completed the work he was to do.

The Court compelled A. A. Lowe to sign the bonds (*Rec., p. 52, fol. 101*).

The bonds came into the hands of George Opdyke as trustee to sign (*Rec., p. 53, fol. 103*).

The railroad company delivered to Culver orders on Opdyke for about $550,000 of the bonds (*Rec., pp. 52–53, fols. 101–102*).

Culver presented the orders to Opdyke, who refused to deliver the bonds, stating that he had delivered them to Geo. Opdyke & Co. as collateral to debts owed by the railroad company to them, and disposed of them so as to net 92 or 92½ per cent. on the dollar, which had been credited to the railroad by Geo. Opdyke & Co. (*Rec., p. 52, fol. 101*).

After the contract of February 24th, 1876, was made, the trust company and Culver bent their energies to

the prosecution of the claim of $22,000 against Allen, Stephens & Co.

The trust company advanced the moneys required to carry on this suit (*Rec., pp. 43, 44, fols. 86, 87; Rec., pp. 45, 46, fol. 89-91*), excepting a fee of $1,000 for extra and special counsel that Culver desired to employ and the expediency of which they doubted (*Rec., p. 68, fol. 129*).

After a stubborn litigation, judgment was recovered against Allen, Stephens & Company on September 4, 1877, for $25,000 (*Rec., p. 62, fol. 119*).

The trust company expended $4,329.21 in prosecuting this claim to judgment, but included in this was the $1,000 extra counsel fee, for which Culver gave five $200 notes, and agreed to pay promptly outside of this matter (*Rec., pp. 62-68, fol. 29*).

On July 26th 1877, Culver received from the trust company a letter as follows:

" Daniel M. Lyon, Pres't. Wm. A. Whitehead, Treas.
Nathaniel Niles, Vice Pres't. James V. Bentley, Sec'y.

THE AMERICAN TRUST COMPANY OF NEW JERSEY.

NEWARK, N. J., July 26th, 1877.

MR. DELOS E. CULVER, Jersey City:

DEAR SIR—Your letter of yesterday's date with note of $5,428.61 has been received, and I enclose the old note cancelled.

Your obligations mature as follows:

Aug.	2	$4,829 15
"	25	5,331 29
Sept.	2	4,853 94
"	29	4,873 36

Oct. 3		$4,885 23
" 25		4,219 96
" 29		4,901 66
Nov. 28		5,428 61
Dec. 3		4,938 59
		$44,261 79

to which is to be added:

1876.			
	Cost of chose in action	89 00	
Jan. 22	Paid J. W. Culver for expenses	100 00	
Mar. 25	Paid J. W. Culver for expenses	325 74	
May 16	Paid G. R. Foster, act. of Bonds	245 00	
1877			
Mar. 19	Paid Culver & Shoudy	100 00	
Feb'y. 14	" do	300 00	
Ap. 21	" do	100 00	
			$1,179 74
	Total		$45,441 53

(Continuation of Ex 61a.)

The securities we hold are as follows:

D. E. Culver against Allens, Stephens & Co	$22,000 00
D. E. Culver claim on the N. Y. O. Midland R. Ry. Co. and Geo. Opdyke for breach of contract	600,000 00
D. E. Culver's claim on the N. Y. & O. Midland R. Ry. for work performed, etc	400,000 00
49 bonds of the N. Y. & Oswego extension bonds, $1,000 each	49,000 00
4 bonds of the Ridgefield Park R. Ry. Co. $1,000 each	4,000 00
6 bonds of the Ridgefield Park R. Ry. Co. $5,000 each	3,000 00
13 bonds Rockland Central R. Road $1,000 each	13,000 09"

Rec. pp. 43, 44, fols. 86, 87

Pending the suit against Allen, Stephens & Company Culver requested the trust company officers to prosecute the claims against the New York and Oswego Midland Railroad Company and George Opdyke. These requests were made two or three times after his indebtedness had been renewed under the memorandum of February 24th, 1876, and before the trust company failed. The officers answered the first time that they wanted to see how the claim against Allen, Stephens & Company turned out, as it cost so much money, and the last time Mr. Whitehead said that they had no money, that they were hard pressed for money, and that if Culver would give them $10,000 they would turn the whole matter over to him *(Rec., p. 60, fol. 116)*.

Culver offered his services in the prosecution of these claims to the trust company *(Rec., p. 49, fol. 95)*.

Shortly after judgment was obtained against Allen, Stephens & Company they failed, but finally the trust company received on account $6,250 *(Rec., p. 27, fol. 54; Rec., p. 18, fol. 36; Rec., p. 62, fol. 119)*.

The trust company became financially embarrassed in 1878, and in January, 1879, George Wilkinson was appointed Receiver, and from the time of the memorandum of February 24, 1876, nothing was done by the trust company in relation to the prosecution of the claims against the New York and Oswego Midland or the claims against the New York and Oswego Midland and George Opdyke *(Rec., p. 72, fol. 137)*.

Pending these matters the reorganization plans of the Ridgefield Park, Rockland Central and Jersey City and Albany Railroad Company had been proceeding as well as the reorganization of the

New York and Oswego Midland Company (*Rec., p. 68, fol. 130; Rec., p. 74, fol. 140–142*).

Culver notified the trust company and the Receiver of the last day within which to pay assessments on the Rockland Central and Ridgefield bonds in order to obtain in exchange the reorganized bonds (*Rec., p. 41, fols. 82–83; Rec., p. 42, fol. 84*).

Culver also proved that he notified the trust company and the Receiver of the last day in which the old securities could come in under the reorganization, and that the foreclosure then completed would wipe out the bonds and make them valueless (*Record, p. 68, fol. 130*).

It was further proved that the judgment sued upon in this action was founded upon renewals of the notes mentioned in the memorandum of February 24th, 1876, and the five two hundred dollar notes for extra counsel fee, the special matter above mentioned.

In the meantime the reorganization of the New York and Oswego Midland Company was also progressing, and Culver proved the value in the open market of judgments against that company down to the time of the completion of the reorganization proceedings in 1880 (*Rec., 59, fol. 113, 114; Rec., pp. 72, 73, fols. 137–139*), and that finally all the floating debts of the company were wiped out by the completion of the foreclosure and reorganization in 1880 on the turning over of the road to the new company (*Rec., pp. 74, 75, fols. 140–142*).

Evidence to prove the following facts contained in the statement above recited was offered on behalf of the plaintiff in error at the trial and rejected. Exception was taken on which error is now assigned.

In the course of the trial oral evidence was offered on behalf of Culver that the trust company agreed orally to prosecute the claims held as collateral, and that it was not within the purview of the parties that the judgment against the New York and Oswego Midland should be collected by execution, but that it should be sold or used in reorganization proceedings then pending as might be best for the interest of the parties. This evidence was excluded and exception taken (*Rec., p. 42, fol. 83*).

Evidence was also offered on the part of Culver to prove an oral agreement on the part of the trust company as to the Rockland Central and Ridgefield Park Railroad bonds substantially as above set forth; this was excluded, and on this exclusion error is assigned.

Culver also offered to show the value of the Ridgefield Park and Rockland Central bonds from the day of the memorandum down to the time when they became valueless by being wiped out under the foreclosure (*Rec., 68, fols. 129–130*).

A.

Culver also offered to prove that he repeatedly requested the trust company *and the Receivers* to prosecute the claims against Opdyke and the New York and Oswego Midland, and that by the running of the Statute of Limitations against the claim against Opdyke the same has become valueless, and by the foreclosure of the New York and Oswego Midland that claim has become valueless, and that George Opdyke was, during the time when that claim could have been prosecuted against him, abundantly solvent and able to pay any

damages up to the amount of $550,000 that might have been recovered against him.

MR. PARKER: Objected to as irrelevant.

THE COURT: Excluded.

To which ruling the defendant Delos E. Culver, through his counsel as aforesaid, then and there duly excepted (Record, fol. 85, pp. 42, 43; 4th Assignment of Error, p. 81, fol. 154).

ASSIGNMENT OF ERRORS.

There are twelve assignments of error presented by the plaintiff in error *(Rec., pp. 79-93, fols. 146-175).*

And one on behalf of the defendant in error *(Rec., p. 36, fol. 73).*

The third assignment of error *(Rec., p. 78, fol. 148)*, alleging error in refusing to the plaintiff in error the right to open and close on the pleadings, is, of course, withdrawn. The decisions of the Court have settled the rule to be, that error in this respect is not ground for reversal.

The remaining eleven assignments of error divide themselves naturally into two classes.

FIRST. Error arising on rulings of the Court as to the legal effect of the facts proved by the plaintiff in error. These include the 2d, 6th, 7th, 8th, 9th and 10th assignments of error.

SECOND. Error arising out of the rulings of the Court in excluding certain oral evidence offered for different

purposes in the course of the trial. These include the 4th, 5th, 11th and 12th assignments of error.

The first assignment of error is the general assignment (*Rec. p., 77, fol. 147*), and covers both classes.

Under the errors assigned included in the first class there is error requiring reversal, if either of the following legal propositions be true, under the facts as proved.

First. It was the duty of the trust company to prosecute the collateral choses in action at their own expense at least when requested so to do by the pledgor; and it is liable in damages for loss arising from such non-prosecution.

The following errors are assigned on the negation by the Court of this proposition and the contrary ruling:

The 2d (*Rec., p. 77, fol. 148*).

The 6th (*Rec., pp. 85–92, fols. 161–172*).

The 8th (*Rec., p. 92, fol. 172*).

The 9th (*Rec., p. 92, fol. 172*).

The 10th (*Rec., p. 92, fol. 172*).

Second. It was the duty of the trust company to sell the bonds in a reasonable time, viz., before, under causes then at work, they became valueless, and it is liable in damages for loss arising from such neglect.

The following errors are assigned on the negation by the Court of this proposition:

The 7th (*Rec., p. 92, fol. 172*).

The 9th (*Rec., p. 92, fol. 172*).

The 10th (*Rec., p. 92, fol. 172*).

Under the errors assigned included in the second class there is error requiring reversal if under the facts as proved the following evidence was admissible:

FIRST. Oral evidence of the collateral agreement to prosecute the choses in action on the ground that the same under the facts proved came under one of three exceptions to the usual rule, viz.:

(a) The whole contract not being reduced to writing the oral part might be proved by oral evidence.

(b) A collateral agreement may be proved by parol.

(c) Where a writing shows upon its face that it is incomplete and something was agreed upon not clearly stated in it oral evidence is admissible to explain the ambiguity.

The following error is assigned on the exclusion of this evidence: The 4th assignment (Rec., pp. 78-83, fols. 148-157). This assignment includes for convenience in one assignment a number of exceptions taken to the rejection of this evidence under offers to prove made in different ways and under different forms in the course of the trial. Included in this were offers to prove the other facts required to make out a cause of action under it, viz.: the validity of the claims, the amount that could have been collected on them and *repeated requests to the trust company and the Receiver to prosecute (Rec., fol. 87, p. 42).*

SECOND. Oral evidence of the collateral agreement in relation to the paying of assessments and exchange of the bonds for new bonds under the reorganization plan; on the ground that the same under the facts as proved came under the exception to the rule, viz., the whole contract not being reduced to writing the oral part might be proved by oral evidence.

The following error is assigned on the exclusion of this evidence.

The 5th assignment of error *(Rec. pp. 83–85, fols 157–161)*.

THIRD. Evidence to prove by a contract of sale made between Culver and one Gurnee, January 21, 1880, the market value of $100,000 notes, judgments and bonds against the New York and Oswego Midland Railroad Company. This is included in the 11th assignment of error *(Rec. p. 92, fol. 173)*.

FOURTH. Evidence as to the value of the Rockland Central and Ridgefield Park bonds, from February 24th, 1876, to 1880, and of notice to the trust company and Receiver that the mortgage had been foreclosed, and that unless something was done with the securities before the last day to exchange under the reorganization plan they would become valueless.

This is included in the 12th asssignment of error *(Rec. pp. 92, 93, fols. 173–175)*.

Putting the same points in another way :

I.

THE COURT ERRED IN DIRECTING A VERDICT FOR THE DEFENDANT IN ERROR AT THE CLOSE OF THE CASE.

2d Assignment of Error, Rec., pp. 77, 78, fols. 147, 148.

And erred in denying the motion of the plaintiff in error to go to the jury.

10th Assignment of Error, p. 92, fol. 173.

A. Because under the facts as proved it was the duty of the trust company as pledgee

to prosecute the claims, and for the damages resulting from its neglect in this respect it was liable *(6th Assignment of Error, Rec., pp. 85–92, fols. 161–172; 8th Assignment of Error, Rec., p. 92, fol. 172; 9th and 10th Assignments of Error, Rec., p. 92, fols. 172, 173).*

B. Because under the facts as proved it was the duty of the trust company to sell the choses in action in a reasonable time—before under the causes then at work they became valueless—and for the damages resulting from its neglect in this respect it was liable *(6th Assignment of Error, Rec., pp. 85–92, fols. 161–172; 7th Assignment of Error, Rec., p. 92, fol. 172; 9th and 10th Assignments of Error, Rec., p. 92, fols. 172, 173).*

II.

THE COURT ERRED IN CONSTRUING THE MEMORANDUM TO MEAN THAT THERE WAS NO OBLIGATION ON THE TRUST COMPANY TO SELL THE SECURITIES EXCEPT UPON REQUEST OF THE PLEDGOR.

7th Assignment of Error, Rec., p. 92, fol. 172.

III.

THE COURT ERRED IN CONSTRUING THE MEMORANDUM OF FEBRUARY 24, 1876, TO MEAN THAT THERE WAS NO OBLIGATION ON THE PART OF THE TRUST COMPANY TO PROSECUTE THE CLAIMS TO SUIT AT THEIR OWN EXPENSE, ALTHOUGH SUCH PROSECUTION MIGHT HAVE BEEN REQUESTED BY THE PLEDGOR.

8th Assignment of Error, Rec., p. 92, fol. 172.

IV.

THE COURT ERRED IN VIEW OF THE FACTS PROVED AND THE SURROUNDING CIRCUMSTANCES IN EXCLUDING ORAL EVIDENCE THAT PRIOR TO AND AT THE TIME THE MEMORANDUM OF FEBRUARY 24, 1876, WAS MADE THE TRUST COMPANY VERBALLY AGREED TO PROSECUTE THE CLAIMS AND ADVANCE THE MONEYS NEEDED *(4th Assignment of Error, Rec., pp. 78–83, fols 148–158).*

V.

THE COURT, ERRED IN VIEW OF THE FACTS PROVED AND THE SURROUNDING CIRCUMSTANCES, IN EXCLUDING ORAL EVIDENCE THAT PRIOR TO AND AT THE TIME THE MEMORANDUM OF FEBRUARY 24, 1876, WAS ENTERED INTO, THE TRUST COMPANY VERBALLY AGREED THAT THE ROCKLAND CENTRAL and Ridgefield Park bonds should either be sold, or, as the interest of the parties might dictate, that in reorganization proceedings of the respective roads then pending the trust company were to advance the assessment needed to obtain for these securities the new securities of the reorganization company in exchange therefor when the plans for reorganization were completed *(5th Assignment of Error, Rec., pp. 83–85, fols. 157–161).*

VI.

THE COURT ERRED IN EXCLUDING EVIDENCE OF THE CONTRACT OF SALE OF NEW YORK AND OSWEGO MIDLAND SECURITIES BETWEEN GURNEE & CULVER, AS EVIDENCE OF THE MARKET VALUE OF SAID SECURITIES *(11th Assignment of Error, Rec., p. 92, fol. 173).*

VII.

THE COURT ERRED IN EXCLUDING EVIDENCE OF THE VALUE OF THE ROCKLAND CENTRAL AND RIDGEFIELD PARK BONDS FROM FEBRUARY 24TH, 1876, TO 1880, AND OF NOTICE TO THE TRUST COMPANY AND RECEIVER that the mortgages had been foreclosed, and that unless something was done with the securities before the last day, to exchange under the reorganization plan, they would become valueless *(12th Assignment of Error, Rec., pp. 92, 93, fols. 173–175).*

ARGUMENT.

The case naturally presents two principal aspects:

1st. Assuming the correctness of the rulings excluding oral evidence as to the entire contract, what are the rights of the parties on the facts as proved?

2d. Was the oral evidence offered admissible?

Aside from these considerations, the question raised by the 12th assignment of error is presented. Was this evidence of market value of the bonds pledged and notice of the time when, unless sold or exchanged, they would become valueless admissible?

One further question is presented, arising on the exception in the record to the refusal of the Court to give judgment for the plaintiff on the pleadings. This involves the following questions:

A. Are the set-offs and counterclaims set up, arising out of the original pledge, allowable at law against the judgment obtained on the principal debt?

B. Are they admissible against the Receiver of the original pledgee?

The first main question presents the following subdivisions:

I. Is the case before us to be determined according to the general principles applicable to the relation of pledgor and pledgee? And, if so, what are the true principles applicable as to the rights, duties and obligations of the parties?

II. Does the memorandum entered into change these rules, and what is the true construction of that instrument?

These questions resolve themselves into one:

Have we here a case embodying the mere relation or status of pledgor and pledgee or a special contract changing the rule of law?

A.

THE ANSWER TO THIS QUESTION DEPENDS, SO FAR AS CONCERNS THE CHOSES IN ACTION, UPON WHAT WE DEEM THE RULE OF LAW TO BE UNDER THE STATUS.

If upon the pledge of collateral choses in action there arises the legal duty in the pledgee to preserve and collect, then, we have in this case a memorandum which, so far as the choses in action are concerned, is simply in accord with the rule, or a part of it. If the memorandum means the same thing as the rule (see Part Two), the rule applies to this case. If the memorandum amounts to less than the rule, it is only in the omission of an express covenant to prosecute. But, as shown in Part Two below, it contains an implied covenant to prosecute, and hence is equivalent to the rule. Or, if it be denied that this implied covenant exists, the general rule of the status would still apply; because the parties have clearly not negatived the presumption to be derived from the status, and their express contract in relation to matters to be done that could only happen when the rule of the status was observed clearly indicates their intention that that rule should apply to the portions of their agreement not completely expressed. In other words, this is a case where the expression of one thing does not lead to the exclusion of the other because not mentioned; but rather, the express mention of contractual intentions in regard to things that could only exist upon the happening of the usual procedure in the premises, presupposes a contractual intention that the usual procedure should be followed, upon which the expressed contractual intent hinges;

and hence, the rule of law applicable to the status of the parties would properly fill the gap, as covering an ambiguity, and carrying out the real intent of the parties.

In Robinson vs. United States, 13 Wall., 363, it was held that, under a written contract calling for delivery of "1,000,000 bushels of first quality clear barley," evidence of a custom to deliver in sacks instead of in bulk was competent, as the writing being silent it was presumed the parties contracted with reference to the custom, which thus became an implied part of their contract.

A priori, then, when the portion of the contract on which the writing is silent is a part as to which the law of the subject implies a duty to prosecute in the absence of a special contract to the contrary or special circumstances removing the reason for the rule, neither of which exist in this case. The parties are presumed to have contracted with reference to this rule of law, and not having negatived it, the contract being silent on the point, the rule in question applies as to the point so omitted from the express contract.

See cases cited (Point *supra*), where similar memorandums have been held to have no effect on the usual rule.

If, however, it should be ruled that the pledgee of a collateral chose in action is under the relation of mere status under no duty to prosecute, then the memorandum in this case is claimed to change that rule, because it clearly implies a covenant to prosecute (see Part Two).

B.

So far as concerns the securities. A distinction must here be drawn between the effect which the memorandum in this case has upon the rights of the parties in regard to the two classes of property held in collateral, mentioned in it.

We have seen above that, assuming the rule to be that a pledgee of a chose in action must prosecute, the memorandum does not change the rule by its mere silence on that point; especially in view of the fact, that what it contracts to have done at some time, can only be done after a prosecution has happened. This conclusion is also founded on the fact that nothing in the memorandum negatives, or looks to the negativing of this duty to prosecute, or to the realizing on the claims in any other way.

A very different state of facts confronts us in regard to the contractual intentions of the parties expressed in the memorandum as to the securities, when compared with the usual rule of the duties arising from the status of pledgor and pledgee of such securities).

It is a well-settled rule that where chattels are deposited in collateral the pledgee is under no duty to sell them. He may do so if he so elects, but he is not compelled to do so. The presumed intention of the pledge is to keep them safely as security, and, when the debt is paid, return them to the pledgor; otherwise in case of every pledge his property would be sacrificed on a forced sale upon his default.

But in this memorandum there is a clear expression of intention that the bonds shall be sold, not held, and

proceeds realized therefrom, and divided as stated (see Point VII. *supra*). So that in this respect the memorandum changes the usual rule as to this class of property.

The second question presents the following subdivisions :

I. Is oral evidence of the oral promise to prosecute the choses in action admissible.

II. Is oral evidence of the entire contract in relation to the bonds pledged admissible.

Each of these issues depends upon whether the case in hand is to be classed under the general rule excluding oral evidence or one or the other of its exceptions.

The question raised by the 12th assignment must be answered in the affirmative, and the judgment reversed if the Court holds that oral evidence as to the entire contract relating to the bonds is admissible ; or, if the Court holds, with counsel, that the memorandum meant a sale of the bonds within a reasonable time.

The substantial issues of law between the parties on this writ of error are two :

I. Was it the duty of the trust company to prosecute the collateral choses in action at their own expense—

A. Under the transaction as proved, including the memorandum ?

B. If not, is the oral contract admissible to show this duty ?

II. WAS IT THE DUTY OF THE TRUST COMPANY—

A. To sell the bonds in a reasonable time?

B. If not, is the oral contract admissible to show the duty to sell or exchange for new bonds in the pending reorganization and to sell those?

PART ONE.

The law of pledge as applied to the case.

POINTS.

I.

The case before us is to be determined according to the general principles applicable to the relation of pledgor and pledgee.

The detailed proof of this proposition can be best taken up in connection with the discussion at large of the cases.

The cases sustaining it will be found in Points II., III., IV., V. and VI.

Assuming, for the present, that this proposition is acceded to, we take up the discussion of the duties of the pledgee and rights of the pledgor where choses in action are assigned as collateral.

II.

It was the duty of the trust company to prosecute the collateral choses in action to judgment and collection, at least when requested by the pledgor.

Whether we view the facts of the case as embodying simply the relation or status of pledgor and pledgee, or, as supplemented and bounded by the written memorandum, this duty exists in either case.

The legal title to the choses in action in question had been assigned from Culver to his assignee in bankruptcy, and by his assignee to the trust company; or rather, to John McGregor, one of its directors, to hold for the trust company; a detail in the form of the transaction of pledge, which does not in any way militate against the rule hereinafter contended for, nor the reason of it (20*a*) (Beale vs. Bank, 5 Watts, Pa., 529).

The possession, control and management of all action to be taken on them were, therefore, out of Culver, and in the creditor, the trust company. Without their action in the premises the debtor Culver could do nothing with them.

The transfer of the legal title to these choses in action out of the debtor and into the creditor created a pledge and not a mortgage.

Wilson vs. Little, 2 N. Y., 443.
Gay vs. Moss, 34 Cal., 125.

A legal conclusion rendered absolute in this case by the terms of the receipt.

(77) Harris vs. Lombard, 60 Miss., 29.

What then are the reciprocal rights and duties of a pledgor and pledgee of choses in action.

PIGNUS OR PLEDGE IS A BRANCH OF THE LAW OF BAILMENT.

A.

THE LAW OF BAILMENT IS A LAW BUILT UP ON PRESUMPTIONS.

The reciprocal rights, duties and obligations, of the parties as to the care to be exercised, are ascertained, in each individual case, by careful attention to the equity in the case having regard to three main particulars:

1st. The character and capacity of the pledgee.

2d. The character and nature of the thing pledged.

3d. The presumed expectation or implied contract between the parties as to the amount of care to be exercised derived from these particulars and the surrounding circumstances.

In that law we have what is known as "*slight*," "*ordinary*" and "*extraordinary*" care, and "*slight*," "*ordinary*" and "*gross*" *negligence*, as terms measuring the reciprocal rights, duties and obligations of the parties.

A discriminating reading of the cases from the time of Coggs vs. Bernard, 2 Ld. Ray., 909; Wilson vs. Brett, 11 M. & W., 113, and Shields vs. Blackburne, 1 H. Bl., 158, to the decision in S. S. "New World" vs. King, 57 U. S., 469, and down to date will indicate that the Courts pay little attention to the precise definition and application of their chosen terms of "slight," "ordinary" and "gross" negligence to the decision of cases; but rather restrict

"ordinary" and broaden "slight" and "gross," or *vice versa*, to meet the substantial equity of the case; and so they make the actual decision made depend upon one or more of the three essential particulars above mentioned.

New York Central R. R. Co. vs. Lockwood, 17 Wallace, 383.

Thus had the bailee in Wilson vs. Brett not been a skillful horseman, he would not have been held liable; and had the bailee in S. S. New World vs. King not been employed in transportation by a new and dangerous motive power, it would not have been cast in damages. And the bailee in Shields vs. Blackburn escaped because he was not of a class from whom the bailor might expect or require special skill in the conduct of the bailments.

B.

This fundamental principle of the law of bailment extends through the entire subject matter; and, as will be hereafter shown, affects the decision of cases arising as to the rights, duties and liabilities of pledgors and pledgees of choses in action assigned in collateral.

The general rule is stated to be:

"The pawnee is bound to take ordinary care and is answerable only for ordinary neglect."

2 Kent's Com. (12th Ed.), p. 785, star page 578.

"He is bound, according to the civil law, to bestow that care which a careful man bestows upon his own property."

2 Kent's Com. (12th Ed.), 787, star page 80.
McLemore vs. The Louisiana State Bank, 91 U. S., 27.

"If the pawn be of such a nature as to be a charge upon the pawnee, as a horse or a cow, he may in that case use the pawn in a reasonable manner. He may ride the horse moderately and milk the cow regularly, as if he were the owner; and if he derives any profit from the pledge, he must apply those profits towards his debt."

2 Kent's Com. (12th Ed.), p. 787, star page 578.

"The pledge covers not only the debt, but the interest upon it, and all necessary expenses that may have attended the possession of the pledge."

2 Kent's Com. (12th Ed.), 791, star page 583.

The bailee of diamonds is required to exercise an altogether different degree of care from the bailee of potatoes. And what would be gross negligence in a skillful horseman acting as bailee of a horse might be ordinary care in the case of a raw and youthful rider.

Again the bailee having possession is responsible for the ordinary care required to keep and preserve the article. And if the thing pledged be something requiring constant expenditure to preserve it, the acceptance of the benefit of the pledge implies the acceptance of the burden and a contract to fulfill it.

Thus the pledgee of a horse, dog or cow, could not, in answer to a plea of damage for loss of the animal through starvation arising from neglect of the pledgee to feed it, absolve himself by pleading that the pledgor, on request, refused to defray the expense.

Note that an offer to return the animal would raise a totally different question. The point is, that as long as the pledgee elects to hold the subject of the pledge for his own security and benefit, so long is he liable to do all in regard to it that a prudent owner would do to keep and preserve his own property.

In all cases the expense attendant on the keeping and securing of the pledged property is considered and treated as a mere incident to the pledge, to be advanced by the pledgee, and recouped with the debt out of property.

McCalla vs. Clarke, 55 Ga., 53.
Starrett vs. Barber, 20 Me., 457, 460.
Hurst vs. Cooley, 22 Fed. Rep., 183.
Cressman vs. Whitall, 16 Neb., 592.

C.

The rights of the pledgee on default as to the manner in which he will realize his debt from the property depends upon the presumed intention of the parties as derived from the nature of the pledged property.

A.

As to Chattels.

Thus, where chattels are pledged the pledgee on default in payment of the original debt has the implied right to sell.

1 Smith's Leading Cas., 6th Am. Ed., 360, star, page 298.
Jones on Pledges, §§ 661, 651.

This power is implied as the necessary intention of the parties from the surrounding circumstances, and the nature of the transaction. How else is the security to be made available for the purpose of paying the debt?

As to choses in action.

When, however, negotiable paper or a chose in action is pledged as collateral, a different presumption arises from the nature of the property pledged.

These are generally realized by collection, not sale; in no other way can their true value be realized. In the case of a pledge of this description of property the pledgee must collect, not sell.

So held, in regard to promissory notes pledged as collateral, in a case where an alleged custom or usage of New York merchants to sell instead of collecting was held to be unreasonable and void and not to change the rule required by legal principles.

Wheeler vs. Newbould, 16 N. Y., 392.

So held in regard to a chose in action (building contract).

Gay vs. Moss, 34 Cal., 125.

So held in regard to promissory notes.

Fletcher vs. Dickinson, 7 Allen (Mass.), 23.
Joliet Iron Steel Co. vs. Scioto Fire Brick Co., 82 Ill., 548.
Union Trust Co vs. Rigdon, 93 Ill., 458.
Zimpleman vs. Veeder, 98 Ill., 613.

And in

Whitteker vs. Charleston Gas Co. (1886), 16 W. Va., 717,

a bill in equity to foreclose and sell a non-negotiable order on a town pledged as collateral was, on this ground, dismissed. In New Jersey an ordinary note and mortgage cannot be sold (Morris

Canal and Banking Company vs. Fisher, 1 Stock., 667); a bank-book cannot be sold (Boynton vs. Payrow, 67 Me., 587).

These cases all hold that the pledgee has no right to sell, but only to demand and collect a chose in action pledged as collateral.

But as showing the subordination of the whole law on this subject to the general rule above stated, when the chose in action consists of an obligation having a great length of time to run (as corporate or municipal bonds or securities) and the debt a short time, there is a presumption that a realization by the pledgee by sale is intended and a sale is proper (Union Cattle Co. vs. International Trust Co., 149 Mass., 492; Morris Canal Co. vs. Lewis, 1 Beasley, (N. J.,) 323; Richards vs. David, 5 Penn., L. J., 471; Schouler on Bailment, 194).

D.

THE DUTY TO COLLECT IS IMPLIED IN THE PLEDGE OF A CHOSE IN ACTION.

The question then presented is, since the pledge of a chose in action implies the necessity of demand, and suit for collection, in order to realize; and, since it is a class of property which, unlike a chattel becomes valueless in time by mere retention without prosecution, is it not a necessary implication of the pledge of such property that the creditor having the exclusive title and control takes this class of perishable property with the duty to preserve and protect it against its own inherent defects, and

with the right and the duty to, on occasion, prosecute and collect.

The statement of the proposition indicates the clear consistency of the rule requiring creditors to take active measures to preserve the pledged property by collection, and, if necessary, suit, with the general principles of this branch of the law; and the absolute inconsistency of the opposite ruling with the fundamental principles underlying the law of pledge.

The cases are said to be in conflict on this point.

With all due deference to the dicta so stating, we hope to prove to this Honorable Court that with the exception of one or two authorities, wrongly applying other cases not in point, the whole concensus of opinion is to the effect that it is the duty of the pledgee of a chose in action to take active steps to preserve the property, and if necessary, sue at his own expense.

E.

As above stated, and as will be shown more fully in discussing the cases, THE COURT DRAWS INFERENCES AS TO THE LEGAL OBLIGATION ARISING BETWEEN PLEDGOR AND PLEDGEE, NOT ALONE FROM THE MERE RELATION, BUT ALSO FROM ALL THE CIRCUMSTANCES SURROUNDING THE CASE.

It is on this ground that nearly all the cases decided in this branch of the law can be reconciled under the proper heads of the principle and its exceptions.

F.

DISCUSSION OF THE FACTS OF THE CASE IN HAND, AND PRESUMPTIONS FROM THEM AS TO THE INTENTION OF THE PARTIES.

Let us look at the situation of the parties and the contract made in the case now in hand to ascertain if possible the true intent and meaning of the parties and their presumed intentions at the time of the transaction.

On the one hand we have a bankrupt as pledgor and on the other we have a banking institution as pledgee. This bankrupt has just been discharged from his debts in bankruptcy and is about to begin life anew, freed from all liabilities, with little property, but large hopes born of his former great success and large operations. Among the debts he did owe was one of $30,000 to the pledgee, from which he had just been discharged. He renewed this debt by giving new notes for the principal plus the interest. The question is, was this renewal based merely upon the moral obligation arising out of the discharged debt, or was there a valuable consideration on the faith of which this man, recently discharged from enormous liabilities, mortgaged his future for over $35,000. *The circumstances clearly point to the fact that there was a consideration other than the moral obligation existing as the moving cause for this renewal.* Among his assets in bankruptcy were three choses in action of the par value of $1,025,000. Title to these had passed out of the bankrupt. He alone knew their intrinsic value, the chances of success, the possibility of realizing on them, and all the facts relating to them. They are liabilities which are disputed by the parties against whom he claims they exist. He, however, feels that if properly handled and prosecuted judgments for their par value can be obtained on them. He suspects, as the fact proved, that when sold by his assignee they would, in view of these facts, bring a mere trifle.

Familiar with the facts and knowing their value he casts about him for a means of making these cats and dogs valuable; and of snatching victory from defeat through the assistance of some person able to make the necessary advances required to push these claims to collection. He arranges this with his old creditor, and arranges it on the basis that it shall take these claims and prosecute them; and in consideration of its doing so, he renews this enormous debt discharged in bankruptcy. Do the circumstances point to a renewal of this debt without any corresponding obligation on the part of the pledgee to prosecute these claims at their own expense? Or do the circumstances point clearly to the renewal of this debt in consideration of this agreement on the part of the pledgee to prosecute these claims? If the agreement between the parties had been that the pledgee took the assignment of these choses in action, with an election either to prosecute or not as it saw fit, there would have been no valuable consideration moving to Culver to induce him to renew his discharged debt; and the renewal and the execution of the receipt specifying the holding of these claims as collaterals, would not have occurred as parts of the same transaction. This is all the clearer from the fact that the claims were sold to McGregor in November, 1875 (Rec., pp. 57, 58, fols. 11–119), and hence began to be held as collateral or in trust for something and somebody then; yet Culver did not renew his debt until February 24, 1876, when the whole arrangement was consummated (Rec., p. 47, fol. 91). If the renewal was founded merely upon the moral obligation of the discharged debt, there would have been no reason or probability of its being made at the

same time as the receipt given specifying the holding of these choses as collaterals. The fact that the two were intermingled indicates that a valuable consideration in connection with the collaterals was the real moving cause or consideration for the renewal.

Again, look at the circumstances from another point of view. At the time this assignment and this renewal was made what was the condition of these claims? They were claims disputed, not admitted. One of them, the claim against the railroad, was against a corporation then in financial difficulties undergoing foreclosure upon its first mortgage and in the hands of a Receiver. The assignment of claims, situated as these were, was therefore an unmeaning formality unless the parties intended the prosecution of them. Thus only could anything be realized from them, as the parties were well aware. In many cases where collateral claims, negotiable instruments or otherwise have been assigned before they were due, Courts have held that the pledgee took under the duty implied by law, from the presumed intention of the parties to present at maturity and give notice, etc., to hold endorsers, and other Courts have intimated that perhaps there was a doubt as to the correctness of those rulings, holding that the pledgee under such circumstances, was under the further duty of collection by suit in the case of nonpayment. To us it seems that the latter class of cases are a logical corrollary from the principle underlying the former. The rule is based upon the pledgee having the control and dominion and title to the chose, and being the only party capable acting in the premises, and the wasting character of the property. These considerations make it clear that the parties intend

realization by the pledgee by any and all of the steps that would be necessary in the usual course of business to accomplish such a result, as the Court in one of the earliest cases puts it in eighteenth-century English : " The common law detests negligence and laches."

Chamberlyne vs. Delarive (1767), 2 Wils., 353.

As the control and dominion exists in one case to the same extent as in the other, the duty of collection by suit, if necessary, is in principle as binding as the duty to present for payment and give notice, etc. The distinction between the duty to present, etc., for payment and the duty to collect by suit, if it exists, can only depend upon the fact that the pledge being made before the maturity of the collateral chose, the parties are presumed to have in mind its collection in the usual commercial course ; and the nonpayment is as an unforeseen and unexpected event, upon the contingency of the happening of which they have formed no contractual intentions.

The above distinction and criticism of the rule is, therefore, inapplicable to the case in hand. Here the claims were overdue when pledged, and disputed when pledged ; from which the inference is irresistible that the parties intended and agreed upon prosecution by the pledgee for the purpose of realizing. Unless this presumption is indulged in, the whole transaction was a meaningless farce.

Again, a number of cases, while recognizing the general rule that it is the duty of a pledgee of a chose in action to collect by suit if necessary, have held that insolvency of the maker of

the collateral paper at the time when the note came due, was an excuse for the failure of the pledgee to prosecute.

Powell's Adm. vs. Henry, 27 Ala., 612.
Westphall vs. Ludlow, 2 McCrary, 505, 508.
Clark vs. Young, 1 Cranch. 181.

And perhaps it will be claimed here that the New York and Oswego Midland Railroad Company was insolvent, and therefore under this rule there was no duty to prosecute the claim against it.

There are, however, two valid distinctions between those cases and the special circumstances of the case in hand:

1st. The insolvency which was held to be an excuse in those cases was an insolvency occurring after the pledge, or not known to exist at the time of the pledge, and hence the parties may be presumed not to have contracted with reference to that contingency.

2d. Damage is the gist of the pledgors' cause of action, and, in the cases so holding, the insolvency, so far as it appeared from the reports, was a total one, viz., the absconding or removal from the State, or death, without assets of the collateral debtor.

No proof was given in those cases that the debtors' estate paid a percentage to creditors, or that claims against the debtor had a market value, or were of some value. The ruling that insolvency is an excuse for non-prosecution is really dependent upon the maxim that the law does not require a man to do a vain thing. The prosecution is not a vain thing if it would result in realizing anything.

In this case the pledgor proved that if the claims had been prosecuted judgment could have been obtained, which would have had value; and something could have been realized. A very different question, therefore, is presented here. The debtor in this case was not an individual, but a great railroad corporation with large assets and large debts. In process of reorganization then pending almost any claim against it or holding of its stock and bonds had at all times *some value to somebody* in the open market.

Damage being the gist of the cause of action, the proof of the fact that claims in judgment against the collateral debtor were worth from five to fifteen cents on the dollar, with proof of the neglect to prosecute, is proof of the cause of action; and especially is this so, when the pledge took place in view and contemplation of this very situation and its possibilities.

The situation and surrounding circumstances of the parties with reference to this claim, the knowledge of both parties as to the reorganization plan (Rec., p. 47, fol. 93) and of the then financial condition of the N. Y. and Oswego Midland R. R. Co., clearly indicate, that in spite of the financial difficulties under which the railroad then was, the parties to this pledge intended and contracted for a prosecution of this claim. Unless this presumption is indulged in the transfer was, under the circumstances, a meaningless farce.

And when we add to these presumptions the fact of the renewal of this large debt in connection with the receipt given for these choses in action as collateral, the fact of this discharged debtor pledging his future for this large amount in connection with the receipt of these choses

in action, the inference becomes irresistible, that it was intended and contracted that the pledgee should assume the burden of prosecuting and collecting these choses in action. *Had not that been the intention, or had it been intended that the pledgee should have the option or election as to such prosecution, the pledge of these choses in action might have been made, but the old debt would not have been renewed.*

If, therefore, there were nothing in this case but the circumstances surrounding the parties, and a receipt for the collaterals had been executed along with the renewal of the old discharged debt, the implication that the pledgee agreed, as a matter of law and as holder of the pledged property, to, at its own expense, take the necessary steps to collect the choses in action pledged, would be as clear and convincing as it is possible for any case of pledged property to furnish.

When we take into consideration that the Courts have almost unanimously, from the mere circumstances of the status of pledgor and pledgee and transfer of the legal title to a chose in action from the pledgor to the pledgee, presumed, as a matter of law, a duty on the part of the pledgee to prosecute and collect arising out of the nature of the property pledged, we can see clearly how much stronger a case of implied presumption of law arises out of the detailed circumstances of the case in hand.

FIRST. *Then let us look at the authorities as to this implied duty.*

SECOND. *Let us inquire whether there is anything in the*

receipt given in this special instance to exclude the general presumption; and

THIRD. *Let us inquire whether it is competent to introduce oral evidence to show that the promise to prosecute and collect was the moving cause of the transaction and of the renewal of the old debt.*

G.

DISCUSSION OF THE CASES IN THIS COURT.

Questions of this nature appear to have first arisen in this country in connection with the old question whether a note of a third party, given for goods sold, for instance, was received in payment or conditionally in payment. And in

Clark vs. Young, 1 Cranch., 181–192,

where a promissory note had been given in conditional payment, and, on suit brought against the vendee by the vendor on the original contract, it was claimed that the vendor could not recover because he had not sued on the collateral note, the Court held that the instruction of the Court below, that "due diligence might be proved, although no suit was instituted, and that circumstances such as the known insolvency of Edgar, the drawer of the note, or any conduct of Clark preventing a suit, would excuse Young & Co. for not having instituted one," was correct. This case is a practical holding that the pledgee may recover the principal debt against the pledgor without suing upon the collateral unless the pledgor not only shows neglect to sue, but also damage arising from such negligence—a rule

which is now well established by the weight of authority.

In the later case of

Harris vs. Johnson, 3 Cranch, 311,

which was a similar case in all respects, except that the vendor had transferred the note received as conditional payment, the Court held that this transfer barred an action upon the original contract. This was in effect the same thing as allowing the pledgor to set off the value of the converted collateral, a rule now well established.

The law was laid down in no uncertain terms in an early case in England above cited.

Chamberlyne vs. Delarive, 2 Wilson, 253.

This was an action on the case for services. Defendant had given to plaintiff an order on one Heddy desiring him to pay plaintiff £18. Plaintiff took and held the order for four months and never demanded the money of Heddy, who afterwards became insolvent. The Court after saying it is not necessary to give an opinion as to whether the order was a bill of exchange or not, say :

"The plaintiff by accepting this note or draft undertook to be duly diligent in trying to get the money of Heddy, and to apprise the defendant, the drawer, if Heddy failed in payment. The plaintiff substituted himself in place of the defendant, the drawer, who has been deluded into a belief that the plaintiff had got the money of Heddy * * * The common law detests negligence and laches. There is no reason applicable to the case of holding a bill of exchange that is not applicable to this case. The plaintiff by holding this order four months hath discharged the defendant of his debt, and credited Heddy in his stead and place. If this verdict should stand, it would be mischievous. If a jury can say that a man

can hold such an order or draft as this is ten weeks after it is due, they may as well say he may hold it for ten years. Here appears to be gross negligence in the plaintiff." Judgment reversed.

This case was followed in New York in the early case of

Dayton vs. Trull, 23 Wendell, 345.

The question has never come directly under judgment in this Court, except in so far as a decision of it is implied in the foregoing cases in 1 and 3 Cranch and in

Lawrence vs. McCalmont, 2 Howard, U. S., 426–454.

The Court there held per STORY, Judge:

"As to the 7th point the notes having been left *for collection only* with the agents of the London house although endorsed by the Messrs. Lawrence, they do not fall within the strict rules of commercial law applicable to negotiable paper; admitting for the sake of the argument that notice was not punctiliously given by the agents, still it resolved itself into a mere question of due diligence on the part of the agents to collect the notes, and falls under the general law of agency. *No evidence was shown at the trial to establish any loss or damage on the part of Mrs. Lawrence for want of due protest and notice* (if they were not made) *and in the absence of such proof we are not at liberty to presume that the agents* did not do their duty."

The italics are ours. These remarks indicate that *damage* must be proved, as is now the rule.

This case, although often cited as such, is not really a case of pledge at all. The question as to the failure to protest the notes deposited for collection came up under exception to the refusal to charge the 9th request, page 434, which is as follows:

"The notes received by the plaintiffs through their agents to collect ought when there was a failure of payment to have been regularly protested and due notice thereof served on the defendants and J. & A. Lawrence, and on failure thereof a credit should be allowed for the same" (*Id.*, page 434).

The notice intended, therefore, was not a notice for the purpose of holding other endorsers, but a notice to the principal debtor himself of the failure of his collateral debtor to pay his debt, J. & A. Lawrence being the endorsers of the notes deposited for collection, and the defendant being the surety for J. & A. Lawrence.

It is clear, then that so far as this case has been cited in the text books as excusing diligence in pledgees, it has been misunderstood and misapplied.

It may be claimed that the decision in Bast vs. The Bank, 101 U. S., is a case directly in point, but that case is distinguishable for reasons to be hereafter stated.

(See Point V., B., p. .)

In view of the dearth of decisions in this Court upon the issue involved, it has become necessary to consult the digests and reports of all the States, and below is given the result of such investigation.

At the outset it may be stated, that there is no distinction in principle, as to the pledgees duty of taking the necessary steps to collect, between a pledge of negotiable paper, and a pledge of any other chose in action, as judgments, mortgages, etc., and many cases go upon this ground.

See

Chamberlyne vs. Delarive, 2 Wils., 253.
Harper vs. Bank, 12 Lea. (Tenn.), 678.

Since the rule of duty to prosecute is founded, not on the presumed validity of the claim, but on the transfer of the power, control and dominion over the claim from the pledgor to the pledgee, which exists as much in the one case as in the other, it is clear that the foregoing conclusion is correct in principle.

III.

It is the duty of a pledgee of negotiable paper to demand payment and fix the liability of the endorsers and prior parties thereon.

Peacock vs. Purcell (37), 1863, 14 Common Branch N. S., 728.

In this case which involved the duty of the status a bill of exchange had been endorsed by defendant to plaintiff as collateral security for a debt due for goods sold and delivered.

There was an acceptor, drawer and former endorser on the bill. Plaintiffs neglected to present for payment or give notice of dishonor, and defendants claimed that by plaintiffs' laches their remedy on the bill was lost. Plaintiffs insisted that if their remedy on the bill was lost they were still entitled to maintain an action on the original consideration. Plaintiffs were non-suited with leave to move. On such motion the Court sustained the nonsuit.

ERLE, C., J. : "The legal effect of taking a bill as collateral security is that if when the bill arrives at

maturity the holder is guilty of laches, and omits duly to present it and to give notice of its dishonor if not paid, the bill becomes money as between him and the person from whom he received it" (*Id.*, p. 730).

WILES, J.: "But if the creditor when the bill falls due is guilty of laches whereby the security becomes deteriorated or valueless it becomes equivalent to actual payment" (*Id.*, 730).

BYLES, J.: "It is clear that as depositees as they had the rights, so they had the duties, of holders. No one else could present the bill, and as they failed in their duty they discharged the defendant."

Betterton vs. Roope (51), 1879, 3 Lea (Tenn.), 215:

In this case, which was a case of the status only, a delay of three days in presenting the draft, during which the drawee became insolvent, was held to be negligence.

Jennison vs. Parker (43), 1859, 7 Mich., 355, 360:

This case was a case of status, and distinguishes Lawrence vs. McCalmont, 2 How. (U. S.), 426, as not being a case of pledge.

Kennedy vs. Rozier (65, 85), 1887, 71 Iowa, 671.

Whitten vs. Wright (32), 1876, 34 Mich., 92:

In this case, involving the duties of the status, it was held that evidence of the insolvency of the maker of the collateral note was incompetent and such insolvency no excuse for the failure to demand and protest.

Easton vs. German Amer. Bank, 24 Fed. Rep., 523.

(5*b*), Circuit Court, S. D. N. Y., 1885 *(dictum)*.

Smith vs. Milier (56), 1870, 43 N. Y., 171:

This was a case of status, and a payee of a draft taking a check from drawee instead of cash and neglecting to present for payment until the next day, during which the drawee became insolvent, was held liable for the loss.

Dayton vs. Trull, 23 Wend., 345.

Same point, case of status.

IV.

It is the duty of the pledgee of negotiable paper, in case of non-payment at maturity, to bring suit for collection if necessary.

Lamberton vs. Windom, (80c) 1867, 12 Minn., 233.

This is a case involving the duties arising out of the relation of the pure status of pledgor and pledgee, and the opinion in this case is a forcible argument for the equity and justice of the principle applied.

The Court say:

"In this case a note held by the defendants against third parties and not then due had been endorsed to plaintiff as collateral security at the time of the inception of the indebtedness to plaintiffs. It was proved that the collateral debtor was solvent until eighteen months after the maturity of the note and it might have been collected, but since he had become insolvent and the note valueless. The pledgees neglected to

present note at maturity or to notify defendants that it was not paid, and took no steps for collection, although defendants requested them to do so."

The Court, after stating that there was no express agreement on the part of the pledgee to prosecute, say :

"So far as the authorities upon this subject are concerned there is no doubt that the pledgee of negotiable paper as collateral security is bound to ordinary diligence in preserving the legal validity of the pledge, and answerable for a loss through a corresponding degree of negligence to the extent of such loss (2 Pars. on Contr. [5th. Ed.], 511 ; Jennison vs. Parker, 7 Mich., 355).

"And we think, as between the principal debtor and the creditor, in a pledge of a similar character of negotiable promissory notes, for the payment of which third parties are responsible, the authorities both in England and in this country impose upon the pledgee ordinary diligence to preserve the pecuniary value of the pledge, requiring, when necessary, active measures to prevent a loss by the insolvency of third parties, who are liable for their payment (*Ex parte* Mure., 2 Cox, 63 ; Williams vs. Pierce, 1 Sim. & Stewart, 582 ; 2 Pars. on Contr. [5th Ed.] 110, Note T, citing Noland vs. Clark, 10 B. Munroe, 239 ; Beale vs. Mechs. Bank, 5 Watts, 529 ; 3 Leading Cases in Equity [3d Am. Ed.], 552-56 ; 4 Porter, 425 ; Stevens and others vs. Munroe ; Lyon vs. Huntington Bank, 12 Serg. & Rawle, 67). The same doctrine is recognized in Bank of the U. S. vs. Peabody, 8 Harris, 457 ; Biter vs. Brough, 1 Jones, 127."

The case of Smouse vs. Bail, Grant's (Pa.), 397, is here distinguished on the ground that *there was no loss in* that case occasioned by the pledgee's negligence, because the collateral debtor was all the time insolvent. The case of Schroeppel vs. Shaw, 3 N. Y., 446, is distinguished as a case of principal and surety in which stress is

laid upon the fact that no notice had been given by the surety to the creditor to proceed.

(P. 246.) "It is established by the authorities, some of which are above cited, that the pledgee of negotiable paper is bound to ordinary diligence to preserve the legal efficacy of the pledge by demand and notice when necessary to preserve such efficacy; yet, to do this, the pledgee must resort to active measures and incur expense. The reason for thus requiring the preservation of the legal validity of the pledge by the pledgee must be for the purpose of preventing its pecuniary value from being impaired, and because the pledgee only can do it. *Upon what principle, then, can it be said that the pledgee is not required to use ordinary diligence to preserve the pledge from loss by the insolvency of third parties who are liable therefor?* It is to be observed that it is not the insolvency of the debtor himself that is to be guarded against, but a third person; the great object in both cases is to preserve the pecuniary value of the property; to do this, active measures, involving expense, are required in the one case and are necessary in the other; the same degree of diligence is required in each case, and in both the pledgee alone can resort to the means necessary for the preservation of the pledge.

* * * * * *

"But in the case of an ordinary pledge of tangible personal property, the pledgee is bound to ordinary diligence in the preservation of the property whether it is perishable or not. What would be ordinary diligence in the one case would not be in the other, but the diligence is required whatever may constitute it. The identical property, when it can, must be preserved; but, if it cannot, then the value must be preserved. Why will not the same rule apply to bills, notes, bonds and other choses in action? It is not alone the bill-note or bond that is pledged, for those are both the evidence of the indebtedness, but the indebtedness itself is the substantial matter of the pledge. It is as capable of protection as the paper or contract which is the evidence of it; the latter may be lost without impairing the former; but, if the former is lost, the latter is valueless. The indebtedness, then, is the substantial pledge, and

as men, in the exercise of ordinary care, generally preserve property of their own of this character, they may also by the same care preserve it when it is the subject of a pledge, and as between the parties to a contract of pledge, like the one under consideration, we see no reason why the pledgee is not answerable when the pledge is lost *through his negligence*."

Woods vs. Morgan (22 Abb.), 5 Sneed (Tenn.), 79, 82:

A case of the status.

In that case notes had been assigned as collateral and the judgment debtor had confessed judgment on them July 12th, 1855. No execution was issued and the pledgor proved that the money could have been made by execution issued up to December 1st, 1885.

It was argued that the loss, occurring through negligence to issue the execution, was not sufficient to discharge a surety, and that this was such a case.

The Court say: "But is the analogy perfect?" and, admitting that mere delay in pursuing a principal or failure to resort to means to make the debt does not exonerate a surety, hold (page 82): "But by the same authority and in reason the duties and vigilance of a creditor in relation to debts placed in his hands as collateral security by his debtor is entirely different.

"This is a case of trust and confidence imposing duties on the creditor. The assignor of collaterals parts with his control over them, and the assignee should be bound to use proper exertions to render them effectual for the purpose for which they were assigned. The principle is that, when a right of action or judgment is transferred by the debtor to his creditor to secure the debt or as collateral security, ordinary diligence must be used to make it available, and if a loss occurs by negligence, even passive negligence, which is unreasonable and results in loss, it will be a good defense to a suit on the original debt (2 White & Tudor's Leading Cases in Equity, 371, citing *ex parte* Mure., 2 Cox, 63; 5 Simons & Stewart, 518; 6 B. Munroe, 226)."

And the Court held the pledgee liable for the loss.

On a bill of equity by the pledgor to enjoin the pledgee from his action at law, the pledgee was enjoined from proceeding at law on his original claim so far as covered by notes lost through his negligence in neglecting to issue execution upon a judgment obtained on them.

Betterton vs. Roope (51), 1879, 3 Lea. (Tenn.), 215.

Hazard vs. Wells (58), 2 Abb. N. C. (N. Y.), 444:

A case of status simply.

Wakeman vs. Gowdy (2), 1863, 10 Bos., 208, 212:

This was a case of pure status.

"There was no express direction given to plaintiffs to sue the makers, nor was there any express agreement or understanding that the defendant would pay any costs or expense of a suit for the collection of the note" (*Id.*, p. 212).

Held that it was the pledgee's duty to use reasonable care and diligence, and he was liable for the absence of such; and the fact that the maker of the collateral note threatened defense to a suit on it did not excuse the pledgee's action in not prosecuting it, and where the pledgee did nothing for three months during which the maker of the collateral note became insolvent, it was held that the loss fell on the pledgees.

Burt vs. Horner (6), 1849, 5 Barb., 501:

A case of status.

This was an action against a guarantor of the collection of a note. The maker resided in Canada, and the holder delayed suit for seventeen months.

Held laches which discharged the guarantor, there

being no dispute about the fact that the maker had property, etc., when the note fell due.

Hoard vs. Garner, 10 New York, 261 :

A case of an express promise to use diligence in collecting a bond and mortgage.

Barrow vs. Rhinelander, 3 Johnson Ch. (N. Y.), 614 :

A case of status.

In this case it was held by Chancellor KENT that a person who receives bonds and notes as collateral security for a debt is bound to use due diligence, and, if they are afterwards lost through his negligence by the insolvency of the makers, he is chargeable with the amount.

This case is cited with approval by the Court of Appeals in Bennett vs. Austin, 81 New York, 308, 321, where in a mixed case of pledge and suretyship the Court state the rule as follows :

"According to a well-settled principle they (pledgees) are also bound to exercise reasonable diligence and care" (Brandt on Suretyship, Sec. 384; Wakeman vs. Gowdy, 10 Bosw., 20; Barrow vs. Rhinelander, 3 Johns. Ch., 615; Sellers vs. Jones, 22 Penn. St., 423; Lee vs. Baldwin, 10 Ga., 208; Slevin vs. Morrow, 4 Ind., 425)."

Buckingham vs. Payne, 36 Barb., 81.

Russell vs. Hester (16), 1846, 10 Ala., 535 :

Case of status.

Cocke vs. Chaney, 14 Ala., 65 :

Case of status.

Pickens vs. Yarborough's Adm. (47), 1855, 26 Ala., 417, 424.

Powell's Adm. vs. Henry (46), 1855, 27 Ala., 612.
Trotter vs. Crockett, 2 Porter (Ala.), 401.
Kiser vs. Ruddick (15), 1847, 8 Blackf. (Ind.), 382.
Slevin vs. Morrow (28 b), 1853, 4 Ind., 425.
Depuy vs. Clark (27), 1859, 12 Ind., 427.,
Lee vs. Baldwin, 10 Ga., 208.
Gardin vs. Jones (45), 23 Ga., 175, 181.
Succession of Liles (38), 1872, 24 La. Ann., 550.
Commercial Bank of New Orleans vs. Martin, 1 La. Ann., 344.

Roberts vs. Thompson, 14 Ohio St., 1, 7 :
Dictum.

Easton vs. German American Bank, 24 Fed. Rep., 523 :
Dictum.

Steger vs. Bush (11), 1843, 1 Smedes & Marshall (Miss.), 172 :
Case of status.

Kennedy vs. Rosier (85), 71 Ia., 671 ; (65) 1887 :
Dictum.

Semple & Burge Mfg. Co. vs. Detwiler (60), 1883, 32 Kans., 386 :

(A case of an express contract to collect, but seems to go on general principle.)

Mullen vs. Morris (23), 1845, 2 Pa. St., 85, 87.
Douglas vs. Mundine (75), 1882, 57 Tex., 344.
Plymouth Company Bank vs. Gilman (73), 1889, 6 Dak., 304.
Foote vs. Brown (1841), 2 McLean (Ind., 369.
Clark vs. Young, 1 Cr., 181.
Rumsey vs. Laidley (W. Va.), 12 S. E., 866 ; 34 W. Va., 721.

Chaffee vs. Purdy, 8 So. Rep. (La.), 923 ; 43 La. Ann. :
A case of status.

In this case notes overdue and in the hands of the pledgor's attorney for collection were pledged and remained in the hands of the pledgor's attorney for collection, with pledgor's consent. The pledgees prosecuted the collateral notes to a foreclosure of a mortgage, which secured them, successfully defending two injunction suits brought by the collateral defendant, and finally sold the mortgaged property and rendered an account crediting proceeds and deducting expenses, which pledgor accepted as satisfactory. Later (pledgees suing on the balance) the pledgor set up negligence in not suing collateral debtor for balance not realized on mortgage property and for rent of mortgaged property that pledgor claimed pledgee should have collected while Sheriff was in possession. The Court held the last claim invalid, as it was doubtful that Sheriff could collect rent, and first claim invalid *because the collateral debtor* HAD BECOME *insolvent*. They say: "*The pledgee is responsible only for damages sustained and for the net sum he was legally able to collect*" (p. 925).

Blonin vs. Hart, 30 La. Am., 714.
Grove vs. Roberts, 6 La. Am., 210.

This rule is implied in the following cases holding that insolvency of the collateral maker excuses prosecution.

Clark vs. Young, 1 Cranch., 181.
Westfall vs. Ludlow, 2 McCrary C. Ct., 505.

Powell's Adm. vs. Henry (46), 1855, 27 Ala., 612.
Trotter vs. Crockett, 2 Porter (Ala.), 401.
Kiser vs. Ruddick (15), 1847, 8 Blackf. (Ind.), 382.
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(A case of an express contract to collect, but seems to go on general principle.)

Mullen vs. Morris (23), 1845, 2 Pa. St., 85, 87.
Douglas vs. Mundine (75), 1882, 57 Tex., 344.
Plymouth Company Bank vs. Gilman (73), 1889, 6 Dak., 304.
Foote vs. Brown (1841), 2 McLean (Ind.), 369.
Clark vs. Young, 1 Cr., 181.
Rumsey vs. Laidley (W. Va.), 12 S. E., 866; 34 W. Va., 721.

Chaffee vs. Purdy, 8 So. Rep. (La.), 923; 43 La. Ann.:
A case of status.

In this case notes overdue and in the hands of the pledgor's attorney for collection were pledged and remained in the hands of the pledgor's attorney for collection, with pledgor's consent. The pledgees prosecuted the collateral notes to a foreclosure of a mortgage, which secured them, successfully defending two injunction suits brought by the collateral defendant, and finally sold the mortgaged property and rendered an account crediting proceeds and deducting expenses, which pledgor accepted as satisfactory. Later (pledgees suing on the balance) the pledgor set up negligence in not suing collateral debtor for balance not realized on mortgage property and for rent of mortgaged property that pledgor claimed pledgee should have collected while Sheriff was in possession. The Court held the last claim invalid, as it was doubtful that Sheriff could collect rent, and first claim invalid *because the collateral debtor* HAD BECOME *insolvent*. They say: "*The pledgee is responsible only for damages sustained and for the net sum he was legally able to collect*" (p. 925).

Blonin vs. Hart, 30 La. Am., 714.
Grove vs. Roberts, 6 La. Am., 210.

This rule is implied in the following cases holding that insolvency of the collateral maker excuses prosecution.

Clark vs. Young, 1 Cranch., 181.
Westfall vs. Ludlow, 2 McCrary C. Ct., 505.

V.

It is the duty of the pledgee of a chose in action to take the necessary steps to collect it by suit or otherwise.

Harper vs. The Bank (8), 1883, 12 Lea (Tenn.), 678.

The opinion in this case contains an admirable statement of the law on the subject. The facts were as follows:

Harper assigned to the bank as collateral to his note a judgment against one D for $200, then stayed. D became insolvent before the stay expired, but the surety on the stay bond bought land worth $800, and obtained a deed for it about eleven days after the stay expired—December 30, 1878.

No execution was issued on the judgment until February, 1879, a month and a half after the stay expired, and then the execution was returned unsatisfied. In January, 1879, the surety had assigned the land in trust to pay other debts. The bank thereupon sued Harper upon the original debt, who filed a bill to enjoin the law action. The Chancellor dismissed the bill, and on appeal his decree dismissing the bill was reversed.

The Court say:

"We hold it was the duty of the Bank to have done so, and its failure entitles complainant to the relief sought. As early as the case of Wood vs. Morgan & Co., 5 Sneed., 81-2, the principle was laid down by this Court in case of transfer of collaterals of this class, to wit: notes, debts or choses in action, where the indemnity provided is only to be obtained by their collection, and application of the money to the debt secured, that there was a trust involved

that imposed active duties on the assignee to so collect and apply. As said by Judge CARATHERS: 'The assignor in such case parts with his control over them, and the assignee should be bound to use proper exertions to render them effectual for the purpose for which they were assigned.' *The true principle of diligence in such cases is, that which the nature of the contract and the thing assigned demands.*

"The assignor has lost control over the debt; the other party has obtained it.

"The thing assigned involves the necessity of collection in order to effectuate the purpose for which it was assigned.

"This duty the assignee undertakes, by the nature of the contract, to perform.

"And failure to take steps in the ordinary course of collection of such a collateral whereby it is lost, or rendered in whole or in part ineffectual to the debtor who assigned it, will charge the assignee to the extent of loss thus sustained. This principle has been approved on review of the later authorities by this Court in the case of Betterton vs. Roope, 3 Lea., 216. The case of Cherry vs. Miller, 7 Lea., 305, is not in conflict with the cases cited or principle stated, that being a case of deposit of bonds with only a power of sale in the creditor receiving them.

"The contract was essentially different, therefore a different rule of action held to apply."

Wood vs. Morgan (22*b*), 5 Sneed. (Tenn.), 79).

In this case the pledgee was held liable for negligence in enforcing a judgment obtained on the collateral note.

Hanna vs. Holton (70*a*), (70*b*), 1875, 78 Pa. St., 334:

(Negligence in collecting a judgment obtained on collateral note.)

Lyons vs. Huntington Bank, 12 Serg & Rawle (Pa.), 67:

(Neglect to collect bonds with warrants of attorney to confess judgment.)

Beale vs. Bank, 5 Watts, 529 :

(Negligence in collecting a judgment.)

Williams vs. Price (10), 1 Simons & Stewart, 581 :

(Negligence in collecting a judgment.)

Mayhew vs. Crickett, 2 Swanston, 185 :

(The release of a lien on execution discharged a surety.)

Chamberlyn vs. Delarive, 2 Wils., 353 :

(Neglect in collecting an order on a third party.)

Clay vs. Goodloe, 6 B. Munroe (Ky.), 236 :

A case of a co-surety receiving a mortgage held to be accountable to his co-surety for loss arising from his neglect to enforce the security.

Kiser vs. Ruddick, 8 Blackf. (Ind.), 382 :

(Negligence in collecting accounts, notes and judgments.)

Hoffman vs. Johnson, (24), 1825, 1 Bland (Md.), Ch. 103 :

(Neglect to collect bonds secured by equitable liens on land.)

Succession of Liles (38), 1872, 24 La. Ann, 550 :

(Negligence in collecting notes and judgments.)

Hoard vs. Garner, 10 N. Y., 261 :

In this case there was an express agreement to "take proper means" to collect a bond and mortgage, and the pledgee was held liable for neglect on the part of his attorney, through which loss occurred on the

foreclosure of the bond and mortgage. It would seem however, from the opinion, that the Court would have ruled the same way had there been merely the relation of status. See comment to this effect on this case by Mr. Jones in his article on "The Law of Collateral Securities" in 14 American Law Review, page 713; and other New York cases cited have always followed this case as so ruling (see 10 Bosw., 208, 212).

Northern Ins. Co. vs. Wright (57), 13 Hun, 166:

In this case a bond and mortgage was assigned with guaranty that there was sufficient property to pay it and guaranty of collection. Interest became due on the mortgage, on which default the principal might have been declared due, and the assignor requested the assignee to foreclose. The assignee delayed two years, during which the house on the property was burned and the mortgage became practically valueless. Held, the loss fell on the assignee; the assignor, as surety, was discharged. On appeal this was modified in Northern Insurance Co. vs. Wright, 76 N. Y., 445, 449, holding the assignee not liable for loss accruing on that part of the principal of the mortgage falling due afterwards.

The same distinction is taken under similar facts in

Whitin vs. Paul (59), 1880, 13 R. I., 40.

And the pledgee of notes secured by mortgages was held liable for loss of interest not collected.

Charter Oak Life Ins. Co. vs. Smith (61), 1877, 43 Wis., 329:

(Neglect to collect money due on an insurance policy.)

Plymouth Co. Bank vs. Gilman (73), 1889, 6 Dak., 304:

(Negligence in foreclosing a mortgage.)

Rumsey vs. Laidley, 34 W. Va., 721:

(Negligence in collecting non-negotiable note.)

Exparte Mure, 2 Cox, 63:

(Negligence in *collecting a judgment.*)

Jones on Pledges, § 713.

Cavanaugh's Securities, p. 391.

Soule vs. The Union Bank, 30 How. Prac., 105.

In this case the Supreme Court of the State of New York held that the mortgagee having charged certain premiums against the mortgagor for three years on a life policy of insurance which he included as a part of the principal of the mortgage, and having thereupon paid the premium for the first year but neglected to pay it for the succeeding years, thereby allowing the policy to expire, was liable upon a loss happening within the three years, either as insurer or as guilty of negligence in not making the insurance, and that the whole amount of insurance should be credited on the mortgage before the mortgagee could resort to the lands for payment.

In Bennett vs. Butterworth, 12 How. (U. S.), 367.

This Court in a case of accounting in regard to slaves held under a mortgage held as follows (p. 369):

"The defendant having possession of the slaves and entire control over them was bound to exercise reasonable diligence in keeping them engaged in useful

employment so as not only to pay their necessary expenses, but also to obtain a reasonable compensation for their labor. That he treated them with humanity, provided for their wants and made them comfortable is not sufficient, nor is it a sufficient excuse for him to say that he managed the slaves as they had been managed by Amis, their master.

Bennett held them as a pledge, and he was not at liberty to indulge them in idleness, as their master may have done.

In his peculiar relation as trustee he had active duties to perform, and we think the master did right in rejecting the account rendered, under a management which showed on his part gross negligence, or, in the language of the interlocutory decree, "willful default."

* * * * * *

It is probable that the sum allowed by the Master exceeded considerably the actual money received for the hire of the slaves. But the negligence or want of attention by Bennett in giving indulgence to the slaves, or in failing to have them suitably employed, should not excuse him from an equitable charge of what they could have earned. On this basis the Master acted in making out the account, and we think *it was properly assumed* by him."

The rule of diligence above contended for has the support of Leonard A. Jones, Esq., the well-known law writer:

"The rule requiring reasonable diligence upon the part of the creditor in making demand and giving notice so as to preserve the legal liability of endorsers of the collateral note, and the rule requiring diligence in enforcing payment of the note at maturity, rest upon the same principle and are of equal obligation."

He then quotes from the opinion in Lamberton vs. Windom, 12 Minn., 232, and adds:

"In the exercise of such ordinary care and diligence to preserve the collateral note from being lost by reason of the insolvency of the maker, it is requisite that the

pledgee shall resort to active efforts to collect the note by action."

See article on "The Law of Collateral Securities" in 14 American Law Review, 705.

A.

The foregoing rule of diligence has been enforced and the following circumstances held to constitute negligence on the part of the pledgee, for which he was held liable in damages to the pledgor for the loss thereby sustained, in the following cases.

Where the pledgee received a bond to confess judgment and judgment was entered September, 1858, and became a lien on collateral debtor's farm, but the pledgee allowed the lien to expire September 27, 1863, without revivor; and on July 14, 1866, the collateral debtor sold his farm, and died insolvent January 8th, 1867, it was held that the pledgee had been guilty of negligence and was liable for the loss thus arising to the pledger.

Hanna vs. Holton (20*b*), 1875, 78 Pa. St., 334.

The pledgee claimed that the Statute of Limitations was a bar, and it would have been available if the cause of action arose when the lien was lost by neglect to revive it, though not if it arose later. The Court held the neglect to revive the lien was not the only cause of action, but the continued neglect to collect the judgment (*Id.*, p. 338); the cause of action did not arise when the lien expired, this was was a mere incident of damage; the loss arose when the land was sold, the

money put in the pocket of the debtor and the debtor became insolvent.

AGNEW, J., says, p. 337: "The cases cited for the plaintiff in error are chiefly those of sureties where the indulgence of the creditor was purely permissive, and the surety was therefore held not to be discharged."

"A creditor who holds a collateral security for the protection of his debt stands in a different relation to the assignor of the collateral, though the latter be his debtor. By the assignment a privity in contract is established which invests the assignee with the ownership of the collateral for all of the purposes of dominion over the debt assigned. He alone is empowered to receive the money paid upon it and to control it in order to protect his right under the assignment * * * (*Id.* 338).

It is therefore settled in this State that where the collateral is lost by the insolvency of the debtor in the collateral instrument, through the supine negligence of the creditor, he must account for the loss to his own debtor who invested him with its entire control.

Hanna vs. Holton, (70 *b.*), 1875, 78 Pa. St., 334.

The pledgee held two bonds; one of Hole, payable September 23, 1786, and secured by an equitable lien on the land till the year 1807. In May, 1793, the pledgee obtained judgment against the maker and issued a *ca. sa.*, returnable May, 1794. There proceedings ended. Hole petioned for insolvency April, 1794, but was not discharged until 1802. Held, the loss was due to negligence of the pledgee and the pledgor discharged *pro tanto.*

The other bond, given by a man named Benner, was due January 1st, 1876. Benner died August 10, 1793, leaving some personal estate. The pledgee obtained judgment on the bond May, 1793. and issued a *ca. sa.*, returnable October, 1793. Nothing else done.

Held negligence of the pledgee and loss chargeable to the pledgee.

Hoffman vs. Johnson (24), 1825, 1 Bland (Md.), Ch., 103.

The neglect of the pledgee to issue execution on a judgment obtained on a note assigned as collateral which could have been made out of the land any time within five months after judgment entered, was held negligence in the pledgee and loss chargeable to the pledgee.

Wood vs. Morgan (22b), 1857, 5 Sneed, Tenn., 79.

The neglect of the pledgee to collect from the Justice of the Peace $50 paid upon a judgment theretofore assigned to the pledgee, was held to be negligence and the loss chargeable to the pledgee.

Beale vs. Bank (79a), 1836, 5 Watts, 529.

Where the pledgee received an assignment of notes as collateral then past due, with authority to collect and out of proceeds pay all reasonable charges and the assignor guaranteed payment, the following acts on the part of the pledgee were held negligence and the pledgee liable for loss:

1st. The pledgee declined to accept from one debtor valuable security, and after obtaining judgment on a portion failed to have the judgment recorded so as to secure a lien on the land, and upon subsequent judgments recovered by other parties all of the property of the defendants was sold.

2d. Executions having been issued and in the hands of the constable, the pledgee caused them to be returned without levy, although defendants had lands, and the parties owning the notes thereafter became insolvent. Held, negligence and loss fell on pledgee.

Douglas vs. Mundine (75), 1882, 57 Tex., 344.

Neglect on the part of the pledgee to enter judgment on warrants of attorney to confess it and take steps to collect was held to be negligence in

Lyon vs. Huntington (Ia.), 12 Serg. & Rawle (Pa.), 67.

The neglect of the pledgee to bring suit for three months on notes assigned as collateral, during which the collateral debtors become insolvent, was held to be negligence, although a defense was threatened to the notes; and the pledgee was held liable for the loss.

Wakeman vs. Gowdy (2), 1863, 10 Bosw., 208 (N. Y.).

The pledgee received two notes as collateral security. He neglected to take steps for the collection of either note; one maker became insolvent and the other maker went to California, leaving no property. Held, negligence in pledgee and loss chargeable to him.

Slevin vs. Morrow (28*b*), 1853, 4 Ind., 425.

A pledgee of a judgment assigned as collateral security, sued out three executions, gave time to the judgment debtor and got part payments, but finally the judgment debtor became insolvent. Thereafter the pledgee sued the pledgor at law upon the principal debt, and a bill was filed by the pledgor's executor to

restrain the action at law on the ground of loss of collateral to the amount to the debt. The Court, *John Leech, Vice-Chancellor*, referred it to a Master to take proof of loss as to what the pledgee might have realized from the collateral by diligence.

Williams vs. Price, (10) 1824, 1 Sim & Stuart, 581.

Where a creditor holding a judgment as collateral security failed to issue execution upon the judgment until the debtor became insolvent, he was held liable for the loss.

Ex parte Mure, 2 Cox, 63.

The neglect of three days in presenting a draft assigned as collateral, during which the drawee became insolvent, was held negligence, and loss chargeable to pledgee.

Betterton vs. Roope (51), 1879, 3 Lea (Tenn.), 215.

Same point.

Smith vs. Miller, 43 N. Y., 171.

The transfer of the collateral note by the creditor receiving it in conditional payment amounts to his collecting it at par, and he is charged to that extent.

Cocke vs. Chaney (44), 1848, 14 Ala., 65.
Harris vs. Johnson, 3 Cranch., 311.

A settlement made by the pledgee with the solvent maker of a collateral note for less than the full amount was held to be negligence, and the pledgee chargeable with the loss.

Depuy vs. Clark, 12 Ind., 427.

Same point.

Union Trust Co. vs. Rigdon, 93 Ill., 458.

The neglect of the pledgee to sue upon a note assigned as collateral, when the maker was a long time solvent and afterwards became insolvent, was held negligence, and the loss chargeable to the pledgee in

Lamberton vs. Windon (80*a*), 1867, 12 Minn., 233.

The neglect and refusal of the pledgee to take the amount of a bond in land at a reasonable price, which was the only means of payment in the power of the collateral debtor, and which the pledgor desired to have done, was held negligence, and the loss chargeable to the pledgee when the maker of the bonds afterwards became insolvent.

Barrow vs. Rhinelander, 3 Johnson's Chan., 612.

It is true that this case was reversed in

17 Johnson, 538, on this point, but the decision in the Court of Errors appears to have gone on the fact that the pledgor was insolvent and his estate in the hands of an assignee, thereby complicating the validity of his assent to such disposition of the collateral bond and certain other special facts in the case; while the decision below, as shown above, has been accepted in New York and also in other States as a true statement of the general principle.

An assignee of a bond and mortgage, the assignor having guaranteed collection, and that the property was sufficient to pay it, was held liable for neglect in fore-

closing, when pending such neglect, the house on the property was burned.

Northern Ins. Co. vs. Wright (57), 13 Hun, 166. Modified in 76 N. Y., 445.

Where an insurance policy was collateral to a bond and mortgage, and a loss occurred by fire, and the amount was adjusted and payable to the mortgagee December 1st, 1870, and he neglected to collect it, and the insurance Company became insolvent January 1st, 1871, it was held negligence in the pledgee, and the loss chargeable to the pledgee.

Charter Oak Life Ins. Co. vs. Smith (61), 1877, 43 Wis., 329.

A delay of four months in collecting an order on a third party, during which time he became insolvent held negligence and loss chargeable to pledgee in

Chamberlyn vs. Delarive, 2 Wills., 353.

Where a covenant was entered into "to take proper means" for the collection of a bond and mortgage the covenantor was held liable for loss arising through negligence and delay on the part of his attorney in foreclosing the bond and mortgage.

Hood vs. Garner, 10 N. Y , 261.

And the same ruling was made in a case of a note secured by a mortgage assigned as collateral in which there was no express agreement, in

Plymouth County Bank vs. Gilman, (73), 6 Dak., 304.

Where a creditor released the lien of an execution a surety was held discharged in

Mayhew vs. Crickett, (64), 2 Swanston, 185.

Where there was an agreement to prosecute a collateral note and the creditor did nothing for several years, held, negligence and the pledgee liable for the loss, and that the burden was on him to prove diligence or excuse.

May vs. Sharp, (39), 1873, 49 Ala., 140.

Where a non-negotiable note had been assigned as collateral it was shown that one maker had died and the pledgee had filed the note in a creditor's suit to settle his estate and part of the note had thus been paid twenty years later. It was not shown whether the second maker was insolvent. It was shown that after the pledge an endorser died leaving a solvent estate which was settled without the note being proved against it.

In a suit on the original debt it was held that the pledgee had not used reasonable diligence, and the pledgor was entitled to charge him with the amount of the collateral note.

Rumsey vs. Laidley, 34 W. Va., 721.

Where the maker of a collateral note was good for four years and then became insolvent and the pledgee had never prosecuted the note, it was held that the pledgee was guilty of negligence and the loss chargeable to him.

Hazard vs. Wells, 2 Abb. N. C., 444.

The neglect of a mortgagee, holding a mortgage for the benefit of himself and his co-surety, to enforce a mortgage was held to relieve his co-surety to the extent of the loss thereby arising.

Clay vs. Goodloe, 6 B. Munroe (Ky.), 236.

The neglect of a mortgagee in possession to keep slaves employed, as a prudent master would have done, was held to make him liable for the loss thus arising on an accounting with the mortgagor.

Bennett vs. Butterworth, 12 How. (U. S.), 367.

The following cases, while recognizing the general rule that the pledgee is bound to diligence, declare that he is not liable for negligence if between the pledge and the maturity of the collateral note the collateral debtor becomes insolvent.

Clark vs. Young, 1 Cranch., 181.
Westfall vs. Ludlow, 2 McCrary, 505, 508.
Powells, Adm., vs. Henry, 27 Ala., 612.

And in a case where there was an express agreement to collect and the pledgee obtained judgment and issued an execution, which was returned *nulla bona*, and proved the makers of the collateral notes had become insolvent and left the State, it was held, that the pledgee had used due diligence and was not liable for the loss.

Camden vs. Doremus, 3 How. (U. S.), 515.

B.

The following case is the only case in the books DIRECTLY HOLDING *that the pledgee of a chose in action is under no duty to prosecute.*

Murphy vs. Bartsch (88), 1890, 23 Pac. Rep. (Idaho), 82.

It is impossible to tell from the opinion written in this case exactly what the Court intended to hold. Thus, whether they held that the

absence of proof of damage was the ground of their decision or absence of proof of request to prosecute on the part of the pledgor, is left uncertain. On the facts as stated it is a bald ruling that no duty rests upon the pledgee to prosecute ; they cite as sustaining this rule the following cases :

(Aldrich vs. Goodell, 75 Ill., 457 ; Wilkinson vs. Culver, 33 Fed. Rep., 708 ; Bast vs. Bank, 101 U. S., 93 ; Rice vs. Benedict, 19 Mich., 132, 135 ; Roset vs. McClellan, 48 Ill., 345 ; Robinson vs. Hurley, 11 Ia., 412 ; Fletcher vs. Harmon, 7 Atl. Rep., 271.)

Not one of these cases, excepting Wilkinson vs. Culver, 33 Fed. Rep., 708, which is the report of an opinion written in this case on a motion for a new trial below, is in point.

In Aldrich vs. Goodell, 75 Ill., 452, no such ruling was made.

(P. 456 :) "It is claimed that these endorsers have become discharged by the neglect to prosecute a suit against the makers of the notes, the Corys, and to foreclose the accompanying mortgage. The evidence shows that at the time of the maturity of the second note, both of them had left the State. *These facts* UNDER THE STATUTE *excused any diligence to collect by suit against the makers, and the liability of the endorsers became fixed without such suit.*"

And as to the negligence in not foreclosing the mortgage securing the collateral notes, the Court simply hold that there was no proof of damage arising as a result of the neglect to foreclose, *non constat* but that the land equaled the value of the notes, and hence decision below was reversed. The Court therefore simply hold that the pledgor's cause of action is not the non-prosecution but the damage arising from the non-

prosecution, a rule now thoroughly established by the *weight of authority* in the United States.

In Bast vs. 1st Nat. Bank of Ashland, 101 U. S., 93, no such principle is laid down.

In that case the pledgor by assignment in writing assigned to the pledgee a judgment as collateral security for the payment of two notes dated March 1st, 1876, payable in four months after date, and the assignment continued, "And upon the failure on my part to pay such notes at maturity or at the maturity of time for which the same may be renewed, then the said Cory, cashier, is hereby authorized and empowered to sell the same at public sale after ten days' notice to me and apply the proceeds thereof to payment of my said notes," etc.

Execution on the judgment could have been issued and up to May 19th, 1876, the amount due could have been collected on execution, but not after that date, by reason of other executions levied.

No execution was issued until June 19th, 1876.

"Bast made no demand on the bank to issue execution on his judgment at any time before June 19th.

After maturity of the notes, the judgment was sold pursuant to the authority contained in the assignment and $2,141 realized, which was applied towards the payment of the notes. This suit was brought to recover the balance due after this application was made."

There was judgment for the plaintiff below, and writ of error brought. Two questions were presented:

"1st. Was the bank bound by the terms of the written assignment *to take steps for the collection of the judgment before the maturity of the notes.* 2d. Was parol evidence admissible to prove the alleged promise, made simultaneously with the assignment and as part

of the transaction, to issue execution and collect the judgment whenever the money could be made thereon."

The question before the Court, therefore, was not the question of the duty of a pledgee under ordinary circumstances, but as bound and limited by the terms of the written assignment. *The written assignment conferring power to sell only after maturity of the renewed notes with the bank as extended, clearly indicated an intention to keep the judgment intact until the maturity of the renewed notes, and hence excluded the idea of prior collection, at any rate without the request of the pledgor.* The Court make no ruling as to what would have been the rights of the parties after the maturity of the notes. Nor do they make any ruling as to what would have been the rights of the parties had the pledgor requested the pledgee to take steps for collection prior to maturity of the notes. They simply construed the written assignment to mean "that the bank should not before the maturity of the notes take measures to collect the judgment without the consent of Bast," and they further say: "So far as anything appears on the face of the written instrument, he retained full control of the collection by legal process; *but whether that be so or not, he certainly could call on the bank at any time before a sale to take the necessary steps, or permit him to do so, to enforce its collection, or to secure and preserve such priority of lien as the judgment was entitled to over other judgments or executions thereon. If the bank had failed to comply with his demand and loss had ensued, other questions than such as are now presented might have arisen.* But upon the face of the assignment we are

clearly of the opinion that the bank put itself under no obligation to collect *except on the demand of Bast.* Any attempt to do so before the maturity of the notes, *without his consent*, would be a direct violation of the terms of the instrument under which it acquired all its rights."

The effect of this decision, therefore, is that instead of holding that there is no duty on the part of the pledgee to collect a chose in action assigned as collateral it impliedly holds that such duty does exist if the pledgor requests it, because it declares that no duty exists under a contract expressing a different intention, *unless the pledgor requests such action.*

In the case in hand we have this request to prosecute; and hence the case of Bast vs. The Bank, so far as it applies at all, sustains our contention.

The case of

Rice vs. Benedict, 19 Mich., 132, is distinguished below.

The case of

Roset vs. McClellan, 48 Ill., 345,

is not in point. There stock was assigned as collateral security with authority to sell. The Court merely held the usual rule that the pledgee is under no duty to sell a pledged chattel; and that the mere authority to sell did not amount to a contract to sell.

In Robinson vs. Hurley, 11 Ia., 410, there was a pledge of city orders as collateral, which orders had a market value similar to municipal and corporate bonds, etc., and the pledge "reserved the right and privilege of disposing of said city orders at private sale." Again the usual rule as to pledged

chattels was applied—that the pledgee was under no duty to sell. In both of these last cases the pledgor attempted to hold the pledgee liable for depreciation in the market value of the pledged chattel, and in both was unsuccessful. To cite these last two cases in support of the proposition that the pledgee of a chose in action is under no duty to collect, indicates, therefore, a clear misapprehension of the first principles of the law on the subject.

The citation in support of such a rule of the case :

Fletcher vs. Harmon (Me.), 1876, 7Atl. Rep., 271,

indicates even greater carelessness or a worse misconception. That case merely held that, in a suit by the pledgee upon the original debt, the fact that the pledgee had wrongfully and without consideration surrendered the pledged securities to strangers who claimed to own them was not a defense, recoupment or set-off, and could only be availed of by cross-suit.

C.

The following cases are sometimes cited in decisions and text books as being cases holding that a pledgee of a chose in action is under no obligation to take steps for collection.

We deem them, on the contrary, to be cases which are either valid exceptions to the rule that the pledgee must take steps to collect dependent upon the absence of certain facts upon which the rule is predicated ; or, else, the presence of certain other special facts presenting upon principle the necessity of modifying the rule.

These cases are as follows :

Goodell vs. Richardson (17), 1844, 14 N. H., 567.
Noland vs. Clark (26), 10 B. Munroe (Ky.), 239.
Rice vs. Benedict (69), 19 Mich., 132.
Mitchell vs. Levy, 28 La. Ann., 946.
Smouse vs. Bail, 1 Grant (Pa.), 397.

Runals vs. Harding (33), 1876, 83 Ill., 75.
Mills vs. Gettysburg Bank, 8 Watts, 192 (62), 34 Am. Dec., 451.

But these cases, with the possible exception of

Smouse vs. Bail, 1 Grant (Pa.), 397,

are correctly decided and are distinguishable as follows :

A.

The rule of diligence being founded upon the presumed intention of the parties, special circumstances which in the particular case indicate a contrary intention that the pledgee should be under no duty to take active steps to prosecute, control it.

In Noland vs. Clark (26), 1850, 10 B. Munroe (Ky.), 239, the facts were that the pledgeor had deposited the collateral notes with an attorney in Georgia for collection, obtaining a receipt stating that the attorney was to collect and forward to Kentucky in a check on the Northern Bank of Kentucky. This receipt was assigned to the pledgee in Kentucky as collateral security to a debt. At the time of the pledge the pledgee was in failing health and died soon afterward. A suit was brought by the pledgor against the administrator of the pledgee for damages for a loss arising from the fact

that the Georgia attorney collected the notes but failed to transmit. The rule requiring diligence in collection on the part of the pledgee is established in Kentucky,

Clay vs. Goodloe, 6 B. Munroe, 236,

but the Court held that this case was not within the rule on account of the special circumstances existing; namely, that no bonds or notes were delivered to the pledgee, and went into his possession and control; only a receipt of a lawyer engaged in the collection of them in a distant State; and from the fact that the pledgee was sick and ailing at the time of the pledge, and the other circumstances in the case, it was apparent that the intention of the parties was that the pledgee should merely receive the money from the attorney by correspondence, and was under no duty to go to Georgia for the purpose of suing him, and that upon the facts as disclosed the debt had not been lost through the negligence of *the pledgee*.

B.

The rule requiring diligence on the part of the pledgee, being founded upon the control and dominion by the pledgee over the collateral choses, ceases with the reason for it; and, in the absence of this control and dominion, the contrary rule applies.

This fact distinguishes the above case of Noland vs. Clark, and also the following case of

Rice vs. Benedict (69), 1869, 19 Mich., 132.

Claims were in the hands of attorneys for collection, and they gave a receipt reciting that they had received of Benedict the said claims as collateral security for the payment of their indebtedness to A, B and C, different

creditors. The Court held that under these circumstances where some of the claims had been lost through negligence of the attorneys of the creditors the pledgee was not liable for the loss. In each of these last two cases the original choses in action were not transferred by the pledgor to the pledgee. They were, therefore, properly decided on the ground that in the absence of the dominion and control over the choses in action (which were in the hands of attorneys selected by the pledgor) there was no duty to take active steps, at least, in the absence of request on the part of the *pledgor*.

A similar distinction exists in the case of

Smouse vs. Bail (48) 1856, 1 Grant (Pa.), 397.

For in that case there was no delivery of the collateral note to the pledgee, but the mere delivery to him of a receipt of a third party for a note of $200 made by fourth party received for collection; and the pledgee agreed "in the event of his receiving the whole amount of said note to refund the overplus of the $150," the amount due. In this case the Judge charged the jury below (p. 398), "that if the collateral security was lost by the negligence of Bail the debt upon which the suit is brought is extinguished."

The party liable upon the note was proved to have been insolvent all the time and *the claim for damages arose out of the refusal of the pledgee to accept a pre-emption certificate for land in payment* WHICH WAS NOT SHOWN TO BE OF ANY VALUE. The Court on appeal merely held that there was no want of diligence on the part of the holder of this receipt. Evidently on the ground that it was the presumed

intention of the parties that the party who gave the receipt and not the pledgee was the one responsible for the collection, and there was no proof of that party having received anything on the note or been negligent in not receiving it, *and no proof of damage in the absence of proof of value of the pre-emption certificate over the money to be paid thereon.*

If the doctrine of the head note is the doctrine of the case, it has been long overruled in the jurisdiction where the decision was rendered.

See Hanna vs. Holton, 78 Penn. St., 334.

The case is distinguished on the above grounds in Lamberton vs. Windom, 12 Minn., 233.

c.

The rule requiring diligence on the part of the pledgee in taking steps to collect a chose in action, depending, as it does, upon the presumed or actual contract of the parties, is subject to the further qualification—that where it is agreed between the pledgor and pledgee, either expressly or tacitly, that no prosecution shall take place, except with the consent of the pledgor or on his request; or, where circumstances, subsequently arising, place new difficulties in the way of a prosecution of which the pledgor is informed, and he acquiesces in the delay; or, where he assents to the delay, or, under circumstances under which he has the power to procure or control the payment or prosecution, he remains quiescent, the pledgee is not liable for any loss thus arising.

Thus in the case of

Goodall vs. Richardson (17), 1844, 14 N. H., 567 :

The facts were that notes were pledged as collateral, but the pledgor arranged with the pledgee that no prosecution should occur on the collateral until July, 1842 (see p. 563, and Plaintiff's Points, 571). The maker of the collateral note was good until June, 1842, and then failed. Held that the loss was not chargeable to the pledgee, and that *the pledgee was not liable for negligence in the absence of a request on the part of the pledgor to prosecute.*

Note that the head note in this case is misleading.

Again, in the case of

Mitchell vs. Levy (36), 1876, 28 La. Ann., 946,

it was held that a creditor having collateral notes, who delayed action thereon *with the consent of the pledgor*, and then took judgment and issued process, after which the collateral debtor went into bankruptcy and the claim was lost, was not liable for the loss. The Court in this case recognizes the duty of diligence, citing Flower vs. McMiken, 2 N. S., 132, where a creditor was held to be under the duty to issue a *ca. sa.* after a *fieri facias, and held* liable for not doing so.

In the case of

Runals vs. Harding (33), 1876, 83 Ill., 75,

a debtor assigned to his creditor a contract whereby a third party agreed with him to collect and guaranteed the collection of certain choses in action placed in the hands of the third party. After the pledge when this contract was presented by the pledgee to the third party he de-

clared it to be a forgery, and the pledgee notifying the pledgor, the pledgor assented to delaying any prosecution of the document until the return of another person who knew about the facts.

Thereafter the third party went out of the State, and the pledgee made unavailing efforts to find any property in the State on which to realize by suit, *the pledgor meanwhile having made no request or demand for prosecution.* The Court in the first place found that the plea setting up these facts and praying a set-off against the debt was untrue in fact, and also found that, under the circumstances of the case, the pledgee had not been guilty of negligence upon which the loss could be charged to him.

In the case of the

City Savings Bank vs. Hopson (72) 1865, 53 Conn., 453,

notes were assigned as collateral to a debt, the maker of the collateral note being a solvent manufacturing company, of which the assignors, the guarantors of the payment of the same, were stockholders, officers and directors (*Id.*, 456).

The company remained solvent for a year and a half after the transfer and then became insolvent. The bank, the assignee, took no steps to collect, *and the pledgors, the stockholders and directors did not request the bank to do so; and did not themselves, in their capacity as stockholders and directors, take measures to have the notes paid or to secure them. There were other notes under the same pledge that the pledgors requested the pledgee to* prosecute and the pledgee did so.

Held, that the bank was not chargeable with the loss

because there was a presumed acquiescence of the pledgors in the pledgees neglecting to prosecute, arising out of these facts and out of the fact that the defendants, the pledgors, enforced other notes under the same pledge, and had ample opportunity to protect themselves as to these (p. 457). As shown above, the decision in Bast vs. The United States, 101 U. S., 93, went upon the construction of the written memorandum, which was construed to mean that the pledgor retained a control over the action to be taken by the bank in collecting the judgment before the maturity of the principal debt; and that, in the absence of a request or consent by the pledgor *that the bank should take other action for the collection of the same before* the maturity of the notes, a loss occurring meanwhile was chargeable to the pledgor, and not the pledgee.

D.

THE DISTINCTION RAISED IN THE FOREGOING CASES HAVE NO APPLICATION TO THE CASE IN HAND.

In this case the pledgor requested the pledgee to prosecute the claims as to which damages are now claimed (Record, p. 60, fol. 116).

The pledgor has not, therefore, been, as in a majority of the cases above cited in which the rule has been enforced, even quiescent in the matter; but has done all he could to obtain the prosecution of the claims by the pledgee.

The pledgor also offered to prove that he had repeatedly requested the trust company AND THE RECEIVER

TO PROSECUTE the claims. This offer was rejected and an exception taken.

Rec., pp. 42–43, fol. 85.
4th Assignment of Error.

Proof of a request to the Receiver is unimportant, since there is proof of requests on the pledgee and neglect on its part, and the Receiver stands in the shoes of the pledgee. If, however, it is of any importance, it is covered by this offer to prove and this exception and assignment.

An offer of proof being made and rejected and exception taken, the appellate court premises proof could have been made.

Scotland Co. vs. Hill, 112 U. S., 183.

Again, the case was tried under an assumption by the Court that a request to prosecute was, under any circumstances, immaterial (Rec., p. 75, fol. 143). Had the specific objection been taken below that there was no proof of a request on the Receiver to prosecute, further proof could have been produced.

Under such circumstances, should this Court deem a request upon the Receiver to prosecute an essential part of the pledgor's case for damages, it would be unfair to affirm the judgment for lack of such proof. The right course would be to reverse on the substantial law issue, and leave the parties to their complete proof on the new trial.

VI.

Does the memorandum entered into change these rules?

The question here presented is, Is there anything in the particular receipt given which prevents the application of the general rule above contended for—that the pledgee of a chose in action is under a duty to take steps for its collection and liable for loss arising through his neglect so to do?

Omitting the recitals and receipt part of this document, it reads as follows:

> "*The proceeds arising from the sale of said securities and recovered from said choses in action are to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E. Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.*"
>
> Rec., p. 39, fol. 78.

This memorandum is extremely unlike the memorandum existing in the case of Bast vs. The Bank, which, by expressly giving the bank *authority to sell the judgment held as collateral after the maturity of the debt*, implied that the judgment was to be held intact until the maturity of the debt and not collected meanwhile, unless upon request or with the consent of the pledgor; for only on this construction could the authority and power of sale contracted for become operative.

The memorandum in this case contains nothing expressly or impliedly indicating a contract or intention between the parties that these choses in action should not be prosecuted or these bonds not sold.

Clearly, then, there is nothing in this memorandum evidencing an agreement or understanding between the parties contrary to the general rule.

So far as evidenced by this memorandum, the only express contract made between the parties is a contract defining the rights of the parties as they should exist at a time when the prosecution required by the general rule of the law of pledge has resulted in realizing assets. And this express contract, as to the rights of the parties at that time, is a mere statement of what, in the absence of any contract, would have been implied by the law.

By contracting with reference to what should be done with the proceeds resulting from a prosecution, the parties have impliedly said, as clearly as it is possible for an implication to be made, that they intend proceeds to be realized, if possible, namely: that they were contracting with reference to there being proceeds, so far as any action on their part was required to produce them, and hence, not only does the existence of the written memorandum not exclude the operation of the general rule, because, in any event, it merely states a part of the whole contract, leaving the rest to the implication derived from the status, but upon its face it implies the general rule implied from the status.

A.

IN THE FOLLOWING CASES UNDER SIMILAR MEMORANDUMS IT HAS BEEN HELD THAT IT WAS THE DUTY OF THE PLEDGEE TO TAKE ACTIVE STEPS TO REALIZE UPON THE PLEDGED CHOSES IN ACTION UNDER CIR-

CUMSTANCES OF RECEIPTS OR DOCUMENTS BETWEEN THE PARTIES SUBSTANTIALLY AS STATED.

Kiser vs. Ruddick (15), 1847, 8 Blackf. (Ind.), 382.

In this case accounts, notes and judgments were pledged as collateral and a receipt given by the pledgee "*to apply so much of proceeds as he would be able to collect.*" It was held that the pledgor must show that they remained uncollected through negligence or that they became lost through negligence; thereby putting on the pledgor the necessity of proving that the choses in action pledged were valid claims and something could have been realized upon them if prosecuted, following the now-established rule.

In Mullen vs. Morris (23), 1847, 2 Pa. St., 85, 87, notes were assigned as collateral and a receipt given "*when collected to be credited on the note,*" with privilege of returning collateral note at any time, and proof of offer to return in two years after pledged. It was held that a charge by the Court, "*that if the pledgee did prosecute the collateral claims and they became lost, the loss was chargeable to the pledgee,*" was no error.

In Hoffman vs. Johnson (24), 1825, 1 Bland (Md.) Ch. 103. Bonds and notes were assigned which it was declared by the agreement "*when paid are to go in discharge of the amount of said payments.*"

It was held that the pledgee was under the duty of prosecuting and taking steps to collect, and he was held liable for loss arising from his negligence in delaying action.

In Betterton vs. Roope (51), 3 Lea (Tenn.), 215, the

memorandum read: "*Received of James Roope a draft on Barton Iron Co. for $120, payable 30 days from date, dated June 9th, 1877, to be credited on his draft account when collected.*" The pledgee having delayed three days in presenting draft for payment at maturity, during which the drawee became insolvent, was held liable for the loss.

In Beale vs. The Bank (79 *a*), 1836, 5 Watts, 529, the contract was that the plaintiff took the assignment of the judgments *and agreed to credit any amounts paid on them*. The pledgee was held liable for damages in not collecting from a Justice of the Peace $50 paid on one of the judgments.

In Slevin vs. Morrow (28 *b*), 1853, 4 Ind., 425, the pledgor placed two notes in the pledgee's hands, under an agreement to this effect, "*the proceeds of which, when collected, are to be applied to the payment of the*" *debt owing* from the pledgor to the pledgee. Held, the pledgee was under the duty to use reasonable diligence to secure their payment. That this was an obligation of reasonable, not extraordinary, diligence, and that when the holder failed to realize through laches, the pledgor is entitled to credit for the loss; and that it is incumbent on the pledgee to show either reasonable diligence in attempting to collect or excuse for failure. No steps having been taken for collection, and one maker having become insolvent and the other left the State, the pledgee was charged with the loss on both notes.

In Mills vs. Gould (21), 1860, 14 Ind., 278, the memorandum read: *Received of G. & C. $170 worth of accounts and $129 worth of notes "as collateral security to be collected at the cost of Gould & Cross"* (the pledgees).

The Court recognized the general principle of diligence as applicable to the case, and held that the neglect to sue by the pledgee was no defense to a suit on the principal debt, *unless the pledgor showed that the notes could have been collected if sued upon.*

In Wood vs. Morgan (22 *b*), 1857, 5 Sneed (Tenn.), 79, the memorandum read: "*Received of Anderson & Word for Morgan & Co., as collateral security, the following claims endorsed by Anderson & Word.*"

The pledgee was held liable for loss arising from neglect in not prosecuting.

In Douglas vs. Mundine (75), 1882, 57 Tex., 344, *there was an assignment of notes then past due as collateral with authority to collect and out of the proceeds pay all reasonable charges.* The assignor guaranteed payment of the collateral notes (p. 349).

The pledgee was held liable for loss arising through negligence in the manner of collecting the notes (see p. *supra*).

In Semple vs. Birge Mfg. Co. vs. Detwiler (60), 1883, 30 Kans., 386, there was an agreement to collect and apply, after deducting expenses, net proceeds to the debt (p. 398).

It was held that the pledgee was liable for loss arising through his neglect to prosecute.

See also

May vs. Sharp, 49 Ala., 140.
Hoard vs. Garner, 10 N. Y., 261.

B.

Although, therefore, there may be a written document in this case, specifying how the moneys received were to be applied, this does not, under the decisions, interfere with

the application of the general rule : that the pledgee shall take the necessary steps to prosecute and realize upon the pledged chose.

Indeed, if it is ruled in this case that the written memorandum contained the whole contract, the entire contract and nothing but the contract; there are strong grounds for holding that the written memorandum itself implies a contract on the part of the pledgee to prosecute (see Part Two).

VII.

The Court erred in ruling that there was no obligation on the part of the trust company to sell the bonds except upon the request of the pledgor (7th Assignment of Error, Rec., p. 92, fol. 172).

The counsel for plaintiff in error insisted that the memorandum meant that the trust company were to prosecute claims and sell collaterals within a reasonable time (10th Assignment of Errors, Rec., p. 92, fol. 173). And a reasonable time necessarily meant on or before a time when under known causes at work at the time of the contract they would become valueless.

The ruling of the Court on this point is so intermingled with a prior ruling by which evidence of what amounted to a notice or request to sell was excluded, and on which error is assigned by the 12th assignment of errors (Record, pp. 92, 93, fols. 173, 174), that the

three rulings can be more conveniently discussed together.

In the first place, the Court below in incorporating the exception mentioned in its ruling, and thus giving effect and force to a request to sell the bonds as raising the duty to sell under the memorandum, and, in the same breath, denying similar efficacy to a request to prosecute the choses as raising a similar duty, is, to say the least, inconsistent.

The true construction of this memorandum is, as shown above in point ( ), that the pledgee was to dispose of these bonds at some time, not to hold them indefinitely; and as the surrounding circumstances indicate an implied contract to follow and observe the wishes and requests of the pledgor as to the collateral, it is evident that the fair construction of the contract is that the pledgee cannot be made out in default unless a sale or disposal was substantially requested by the pledgor.

Assuming, then, that a request was necessary to raise the duty to sell, and that upon a request to sell it became the duty of the pledgee to do so, it must be admitted that as the proof stood at the close of the case there was no evidence of such an express request. An offer has been made, however, and excluded to prove a notice to the trust company and the Receiver, of the pending completion of the reorganization proceedings, upon the consummation of which these bonds, unless sooner sold or exchanged, would become valueless; and, also, to prove the value of these bonds in the market up to the time the foreclosure proceedings wiped them out, and rendered them valueless (Record, p. 68, fol. 130).

Whether we construe the memorandum as meaning that the trust company were to sell in a reasonable time, or upon request, this evidence was undoubtedly competent as being substantially a notice or request to sell before the bonds became valueless through the foreclosure.

The fact that with that notice, given years afterwards, of the necessity of taking action in regard to these bonds under the pledge, went a request to pay the assessments and exchange them for new bonds according to the collateral oral contract alleged to have been made (see Record, pp. 41,42, fols. 81–83 and 84), while it affords ample moral proof of the existence of such alleged oral contract, should not be allowed to detract from the substantial effect that should be given to such a notice under such circumstances in view of the restricted construction placed by the Court upon the contract.

In other words, rejecting that part of the notice as irrelevant and surplusage because in legal effect no such contract and no such duty rested upon the trust company to pay assessments and exchange, the rest of the notice should be given its full effect upon the contract as proved. The substantial effect of the rest of the notice was: "These bonds you hold as collateral for our joint benefit unless sold or disposed of on or before the date mentioned will become valueless."

There was error therefore in excluding the evidence offered and rejected under the 12th assignment of error for which there should be a reversal.

This conclusion is reinforced when we construe the

intentions of the parties to the contract as finally proved in the light of the surrounding circumstances.

These bonds were not the property of the pledgor or the pledgee at the time the memorandum of pledge was made. The $39,631.29 recited in the memorandum included, besides the discharged debt of $30,000 with interest amounting to $4,631.29, the sum of $5,000 that day borrowed and loaned for the express purpose of investing it in the securities as a joint investment of the pledgor and pledgee. A reorganization of the Jersey City and Albany Railroad was then pending. Culver was an officer of that road, familiar with the property and details of reorganization and knew the probable value of the investment.

Thus he testifies. "The $39,631.29 recited in the memorandum was made up of * * * together with a loan of $5,000 made at the time, February 24th, 1876, with which defendant purchased and turned over on that day to American Trust Company the thirteen bonds of the Rockland Central R. R. Company, and the seven bonds of the Richfield Park R. R. Company, recited as held in collateral by the American Trust Company in the memorandum of Febuary 24th, 1876."

The defendant further testified as follows:

"I used all the money they gave me to buy these bonds. I gave five cents on the dollar, and the plan of reorganization was going on, and the idea that they would become available, and I bought so as to increase my avails and proceeds out of this arrangement, and at once turned them over to the American Trust Company."

The Jersey City and Albany Railroad was reorganized, and under the first arrangement the assessment upon the Richfield Park and Rockland Central bonds required, in order to entitle them to bonds of the new

road under reorganization, was 1 per cent., and after the time expired for letting them the company agreed that if the people came and paid 3 per cent. they would let them in down to the last moment when the company would get ready to wind up its affairs, and the stock and bonds of the new company together sold for fifty cents on the dollar, the income mortgage bonds being more valuable. The old bonds could have been exchanged for new down to the winter and spring of 1880.

"The thirteen bonds of the Rockland Central and the seven bonds of Richfield Park have never been sold" (Record, p. 47, fols. 91, 92).

"We discussed also the way in which the securities of the Ridgefield Park and Rockland Central bonds and the bonds of the western extension were to be made valuable. In reorganizations, where that thing is always done, a percentage is paid in new bonds or in new securities in exchange for old; and I knew of the reorganization plan; and, if I recollect right, I knew about them in all three of those roads. Therefore, my statement to them explained exactly how things would be valuable, both the judgments and the bonds" (Record, p. 48, fol. 93).

Here, then, was a speculative operation made on its face for the purpose of taking advantage of a turn in the market and for the purpose, not of holding the investment, but of realizing as soon as possible. These facts and surrounding circumstances render it clear that when the parties use the words "the proceeds arising from the sale of said securities," etc., they intended and were contracting for a sale of the securities in a reasonable time, and not that they should be held indefinitely until, by depreciation under a train of causes then at work and in full view of which the parties

bought and pledged them, they should become valueless.

As shown above the whole law of bailment and of pledgor and pledgee is founded upon the presumed intention of the parties arising out of the subject matter and the surrounding circumstances.

If from the nature of a chose in action as distinguished from a chattel there arises a presumed intention to realize by collection and not by sale (a sale constituting a conversion, Wheeler vs. Newbould, 16 N. Y.), so, in the case in hand, the circumstances of the special investment then and there made in bonds partaking of the character of both a chose in action and a chattel, and the express contract in regard to the disposition of proceeds to arise from the sale thereof, clearly indicate: first, that the pledged property was not to be held indefinitely but dealt in in order to realize proceeds; and, second, that the manner of realization was to be by sale.

It is admitted that it is a general rule of the law of pledges of chattels that the pledgor is not bound to watch the market or sell and is not liable to damages arising from depreciation while he holds. The rule is founded on the presumed intention of the parties. But it is insisted that in the cases so holding no such special circumstances existed; and that, in view of the special circumstances of this case, the only intention that can be presumed is unquestionably the opposite of the rule.

The Court therefore erred in ruling that the trust company were not compellable to sell in a reasonable time (Rec., p. 75, fol. 143, 7th Assignment of Error; Rec., p. 92) and in excluding evidence of the damages

thence arising under a notice which rightfully limited that time (Rec., p. 68, fols. 129, 130, 12th Assignment of Error; Rec., p. 92, fols. 173–174).

All the circumstances of this transaction indicate that the parties here contracted for diligence in regard to these collaterals.

Had the trust company not had the misfortune to become financially embarrassed in 1878, two years afterwards, and then gone into the hands of the Receiver, in all probability the intentions of the parties and contract made by them would have been lived up to, the proceeds of the collaterals would have paid this debt and this litigation never been moved (Record, p. 72, fol. 137).

VIII.

The Court erred in ruling that there was no evidence of what the law calls negligence on the part of the trust company.

(Record, p. 75, fol. 143; 9th Assignment of Errors, Rec., p. 92, fol. 172.)

This conclusion of the Court seems to be founded upon its construction of the duties of pledgor and pledgee as existing in this case, viz.:

"THE COURT: I have already stated my idea of the legal character of this contract; that there was no obligation on the part of the trust company to sell the stocks and bonds except upon a request of the pledgor, and there was no obligation to prosecute the claims to

suit at their own expense, although such prosecution might have been requested by the pledgor, and there is no evidence of what the law calls negligence on the part of the trust company."

(Record, p. 75, fol. 143.)

For if the neglect to sell and the neglect to prosecute were either of them duties resting upon the pledgee, damages arising from its neglect were in evidence.

A.

IN THE FIRST PLACE, since the objection taken by the Court to the sufficiency of the proof of negligence of the pledgee, presented by the pledgor, was a general objection and no specific objection was made to any specific defect in any portion of the proof, the ruling of the Court can only be sustained here upon grounds which, if fully stated below, could not have been obviated by the production of new evidence on behalf of the pledgor.

In other words, the ruling cannot be sustained here upon any ground which, if raised below, might have been obviated by extrinsic evidence.

A demurrer to evidence must specify its defects.

Binsse vs. Wood, 37 N. Y., 526.
Adams vs. Greenwich Ins. Co., 70 N. Y., 166.
Baylies Trial Practice, 226.

State practice is adopted in the United States Court unless there is a positive rule to the contrary.

Abbott's Trial Brief on the Pleadings, p. 23.

B.

IT IS UNNECESSARY, HOWEVER, FOR THE PLAINTIFF IN ERROR TO INTRENCH HIMSELF BEHIND THIS TECHNICALITY.

The validity of the claims and their value, or the fact that, if prosecuted, proceeds could have been realized, and that through non-prosecution they had become valueless, was fully proved.

a. AS TO THE CHOSES IN ACTION.

It had been proved that the claim against the New York and Oswego Midland Railroad Company was valid, and if prosecuted a judgment could have been obtained for its full amount of $1,000,000, viz.: $600,000 in bonds and $400,000 in stock, the balance due (Rec., pp. 49–57, fols. 95–111; pp. 69–72, fols. 131–137).

Note that on suits by a contractor against a railroad company for a contract price payable in stock and bonds the following principles have been formulated:

1st. If the amount is payable in stock, and that has depreciated so as to have no market value, the contractor is entitled to a judgment for money in lieu of it.

Hart vs. Lanman, 29 Barb., 410.
Moore vs. Hudson River R. R. Co. 12 Barb., 156.

2d. Or to the market value of the stock.

Porter vs. Buckfield Branch R. R. Co., 32 Me., 539.

All cited with approval in

Van Cott vs. Van Brunt, 82 N. Y., 535–539.
Barker vs. Rutland and Washington R. R. Co., 27 Vt., 766.

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As shown above the whole law of bailment and of pledgor and pledgee is founded upon the presumed intention of the parties arising out of the subject matter and the surrounding circumstances.

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It is admitted that it is a general rule of the law of pledges of chattels that the pledgor is not bound to watch the market or sell and is not liable to damages arising from depreciation while he holds. The rule is founded on the presumed intention of the parties. But it is insisted that in the cases so holding no such special circumstances existed; and that, in view of the special circumstances of this case, the only intention that can be presumed is unquestionably the opposite of the rule.

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It had been proved that the claim against the New York and Oswego Midland Railroad Company was valid, and if prosecuted a judgment could have been obtained for its full amount of $1,000,000, viz.: $600,000 in bonds and $400,000 in stock, the balance due (Rec., pp. 49–57, fols. 95–111; pp. 69–72, fols. 131–137).

Note that on suits by a contractor against a railroad company for a contract price payable in stock and bonds the following principles have been formulated:

1st. If the amount is payable in stock, and that has depreciated so as to have no market value, the contractor is entitled to a judgment for money in lieu of it.

Hart vs. Lanman, 29 Barb., 410.
Moore vs. Hudson River R. R. Co. 12 Barb., 156.

2d. Or to the market value of the stock.

Porter vs. Buckfield Branch R. R. Co., 32 Me., 539.

All cited with approval in

Van Cott vs. Van Brunt, 82 N. Y., 535–539.
Barker vs. Rutland and Washington R. R. Co., 27 Vt., 766.

See also

Peto vs. Brighton R. R. Co., 1 Hem. & M., 468.

Myers vs. York and Cumberland R. R. Co., 2 Curtis, 28.

Cook on Stockholders, 17.

In an action for damages for the non-delivery of bonds the par value is presumed to be the value.

Wintermute vs. Cooke, 7 Lans., 478.

In an action for the conversion of a promissory note the par value is presumed to be value.

Booth vs. Powers, 50 N. Y., 22, 27.

In the case in hand there is ample proof of the market value of the stock and bonds of the New York and Oswego Midland R. R. pending foreclosure and reorganization (Record, p. 59, fols. 113, 114, 115; p. 72, fols. 137, 138).

There was also ample proof of the market value of judgments against this company during this time (Rec., p. 73, fol. 139).

And it was further proved that no action was ever taken on this claim by the trust company (Rec., p. 72, fol. 137), although Culver requested them to do so (Rec., p. 60, fol. 116); and that this foreclosure was pending when the pledge of this claim was made (Rec., p. 49, fol. 95); and the reorganization plan then pending *(Id.)*, which Culver knew of and stated to the trust company's officers *(Id.)*, explaining how a judgment could be recovered against the road (Rec., p. 48, fol. 93), and would have value in view of the reorganization plan (Rec., p. 49, fol. 95); and that that plan of reorganization finally went through, by which the

road was foreclosed and bought in by purchasers in 1880 (Rec., pp. 73–75, fols. 139–142); and on such sale and purchase the floating claims became valueless (Rec., p. 75, fol. 142); while pending the completion of the plan they had a market value (Rec., p. 73, fol. 139; p. 72, fols. 137, 138).

As to the claim against George Opdyke:

This was for the value or proceeds of about $600,000 of first mortgage bonds of the N. Y. and Oswego Midland Railroad due to Culver under the building contract, but which one of the trustees, Low, refused to sign until the Court made him do so. Pending this delay Culver, under the contract and promise of the president and George Opdyke, the financial agent of the road, to deliver the bonds as soon as signed, proceeded with the work (Record, pp. 52, 53, fols. 100–103; pp. 69–72, fols. 131–137).

When Low signed on the order of the Court the bonds went into Opdyke's hands as trustee to sign (Rec., p. 53, fol. 103). Culver received an order from the R. R. Co. on Opdyke for the bonds (Rec., p. 52, fol. 101; p. 70, fols. 133, 134). Opdyke refused to deliver them, saying he had given them to his firm, who had sold them at 92 to 92½ cents on the dollar, and credited proceeds on debt owed by R. R. Co. to them (Rec., p. 52, fol. 101).

Here is a clear case of equitable assignment of an equitable right to the bonds pursuant to the building contract, of notice of such equity on the part of Opdyke and agreement estopping him to dispute it, and breach by Opdyke of his contract to recognize Culver's title to the bonds on the faith of which Culver had proceeded with the work.

We have also proof that Opdyke was solvent and worth over a million (Record, p. 73, fol. 138).

And proof of the market value of the bonds at the time of 92 to 92½ cents on the dollar (Rec., p. 52, fol. 101).

Culver's remedy was either to sue Opdyke for damages for breach of contract in not delivering bonds according to agreement after they had come into his possession as trustee for the sole purpose of signing as trustee, proving their market value, or to adopt the sale made by Opdyke as for his account, and sue for the proceeds.

Here was proved a valid cause of action on which, if prosecuted, judgment could have been obtained, and substantial damages proved on account of the failure to do so.

The trust company did nothing with this claim (Rec., p. 72, fol. 137), although requested (Rec., p. 60, fols. 115, 116).

Yet this is what was thought about it at the time of the pledge.

"I showed them my contracts, exhibiting them and explaining and making clear to them how I could recover judgments against the New York and Oswego Midland Railroad certainly, and probably against George Opdyke as well; that is to say, I expected that Mr. Opdyke, being responsible—if we could recover the claim against him, it being a large amount of money—would take care of everything."

Rec., p. 48, fol. 93.

b. As to the securities.

The market value had been proved by the purchase at $5,000 (Rec., p. 47, fol. 91) and the fact that they had never been sold (Rec., p. 47, fol. 92), while evidence had been admitted that the reorganization plan had gone through, and the last date for old bonds to be exchanged was in 1880 (Rec., p. 47, fol. 92) from which the inference of fact that the bonds had become valueless by neglect to sell before that time was a permissible inference for the jury to draw, and, in fact, no question was raised on this point at the trial.

IX.

The Court erred in excluding the defendant below from putting in evidence as proof of the market value of judgments and bonds of the New York and Oswego Midland R. R. Co., a contract for the sale and purchase made between defendant acting for other parties and Walter S. Gurnee.

(11th Assignment of Error, Rec. p. 92, fol. 173.)

(See Rec. p. 59, fol. 114.)

An actual sale is proof of market value.

Crounse vs. Fitch, 1 Abb. Ct. of Apps., 475.
Abbott's Trial Evidence, 309.

PART TWO.

The Law of Implied Contract as Applied to the Case..

I.

It was the duty of the trust company under the memorandum of February 24th, 1876, to prosecute the choses in action at least when requested by the pledgor, and to sell the securities.

Upon the trial of this action the defendant claimed damages for a failure of the plaintiffs' assignor to realize upon certain collaterals assigned as security for the claim in suit.

It was proved that the original claim against defendant was discharged by bankruptcy, and that defendant had certain claims against a railroad company and other parties, a part of his assets in bankruptcy assigned to the trust company, along with other collateral, then deposited, and that thereupon he gave notes, the foundation of the judgment sued on herein, in renewal of the discharged debt. Whereupon the trust company signed a memorandum, hurriedly drawn at the time by the defendant himself, without legal advice. This memorandum is set forth at length page , *supra*, and is found in the record at pages 38, 39, folios 77–79. After reciting the debt and the property held in pledge it goes on to say:

"*The proceeds arising from the sale of said securities and recovered from said choses in action are to be ap-*

plied to pay off said notes and interest and the remainder is to be paid to said Delos E. Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company, in prosecuting claims or selling the securities."

The defendant proved that the trust company had never, although requested to do so, attempted to prosecute the claims in question and they have become valueless.

The claims were proved to have been good and valid claims and damages arising from the failure to prosecute were shown.

At the close of defendants' testimony the Court directed a verdict for the plaintiff, stating that he construed the contract to mean: 1st. That the trust company was under no obligation to prosecute claims even though requested so to do, and that the trust company was under no obligation to sell the securities in the absence of a request so to do.

Defendant had offered to prove a notice to the trust company that unless the securities were sold before a certain date, they would become valueless by the foreclosure of a mortgage (Record, p. 68, fol. 130). This was ruled out.

The defendant excepted to these rulings.

A.

The contract is drawn inartificially by a layman, and, although expressed with some legal terminology, it is only strong as a legal document in its "*whereas*" and its "*now, therefore,*" and becomes a nullity when it attempts to do more by stating what the law would anyhow have implied.

Culver, who drew it, and drew it in a hurry (Record, p. 40, fol. 79), was a contractor of considerable experience, who evidently took up his "whereas" and "now, therefore," from his building contract and his "choses in action" from his assignee's public notice of sale (Record, pp. 57–58, fols. 110–112).

In view of the inartificial way in which it is drawn, and the character of the draughtsman, this is a case where the Court should arrive at its meaning by giving full effect to each word.

It is conceded that the memorandum contains no express agreement to prosecute claims, but it is plain that the words used, viewed in connection with the subject matter and the situation of the parties, clearly imply such an agreement on the part of the trust company.

B.

"*It is a cardinal rule that the writing contains all that may fairly be implied from it.*"

DANFORTH, J., in Jones vs. Kent, 80 N. Y., 585–588, citing Potter vs. The Ontario and Livingston Mutual Ins. Co., 5 Hill, 147.

Booth *et al.* vs. Cleveland Rolling Mill Co., 74 N. Y., 15:

"Whenever something is not expressed in the agreement but it is clear to all men of ordinary intelligence and knowledge of business that it must have been either latent in or palpably present to the mind of both parties when the agreement was made, the Court holds it to have been an implied term."

Woods on Construction of Mercantile Agreements, 356.

See Daniels vs. Harris, L. R., 10 C. P., 8.

Judge CLIFFORD, in Delaware and Hudson Canal Co. vs. Penna. Canal Co., 8 Wallace, 276, lays down the principle thus:

"Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed; but omissions or defects in written instruments cannot be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, *or is indispensable to carry the intention of the parties into effect, as, where the acts to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law, in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract*" (Churchward vs. The Queen, Law Rep., 1 Q. B., 195).

The question then is, What do the words in this memorandum mean, and do they imply something more than is strictly expressed?

The Court has construed the contract to mean that the trust company had an option to sell the securities or prosecute the claims, and were under no legal obligation to do so.

The defendant claims that this is an incorporation into the last clause of an "if," and is making conditional that which upon the face of the contract, viewed in the light of the surrounding circumstances, is positive.

This memorandum, after reciting the property held as collateral, goes on in the contracting part to say: "*The proceeds arising from the sale of said securities and recovered from said choses in action are to be applied.*"

There is no "if," nor contingency here.

There is no sign of doubt or hesitancy.

The parties are contracting with reference to what they expect to happen, and what so far as their actions in the premises are concerned they contract shall happen, if possible. They say "*the proceeds * * * recovered are to be applied.*"

It is, therefore, the clear intention of these parties on the face of this document that, so far as it lay in their power and might be due to their efforts to accomplish it, proceeds were to be recovered on these choses in action, and realized from the sale of the securities.

Thus, the memorandum clearly implies that something was to be done with the securities and with the choses in action; on the one hand a sale, and on the other a recovery; and that it never was the intention that these collaterals should simply be held by the pledgee without action. For, in that case, the words, "the proceeds arising from the sale of said securities and recovered from said chose in action are to be applied," would have been nugatory and useless.

A very strong case in support of this view is the case of Jones vs. Kent, 80 N. Y., 585.

In that case the action was brought to have it adjudged that certain stock and bonds, which came into the hands of defendant Kent, as administrator of the estate of E. Rockwell, deceased, with the interest and dividends received thereon, were held by the defendant in trust; and to compel a sale of said stock and bonds, and for an accounting, etc.

The memorandum between the parties read as follows:

"*Received of J. W. Jones by agreement 1,000 shares*

of St. Joe Lead stock for which I have paid him $3,000. The understanding is that I am to give said Jones one-half of whatever price the same is sold for, WHEN SOLD, *over and above that sum.*"

The Court says the only substantial question upon this appeal is whether the plaintiff is entitled to have a sale of the stock made by the defendant?

And they construed the second clause as follows:

"Now here we have a promise not voluntary as of something thrown in, but forming part of the consideration on which Jones delivered or parted with the stock. It was an inducement to the trade, as much so as the promise to pay, or the payment of $3,000; a further promise to pay Jones the one-half of whatever price the stock is sold for over and above three thousand dollars. So much is plain enough, and this construction accords with the argument of the learned counsel for the respondent, as stated upon his printed points. He says: It acknowledges the receipt of the stock and then states the price paid and to be paid for it. There is then no intention of a gift, but the expression of a promise upon good consideration.

"The time of performance is stated. It is 'when' or at the time that the stock is sold. It does not in words say that the stock shall be sold, but as Jones can have the price or consideration of its transfer from no other source, it seems manifest that both parties understand that the event should at some time happen. (Telegram, etc., Co. vs. McLean, 8 L. R., Chy. [App. cases], 658; McIntyre vs. Belcher, 14 C. B. Reports (N. S., 654).

Thus only could the price be ascertained."

Jones vs. Kent, 80 N. Y., 585.

So, in this case, the words "*the proceeds arising from the sale of said securities and recovered upon said choses in action are, etc.,*" imply that both parties understood and contracted that (so far, at least, as their efforts in that behalf were concerned) *these events should at some time happen.*

This implication is made even clearer by the subsequent clause which reads "*the proceeds*" * * * *are* to be *applied*" * * * "SUBJECT TO THE REPAYMENT OF MONEYS EXPENDED BY THE SAID AMERICAN TRUST COMPANY IN PROSECUTING CLAIMS OR SELLING THE SECURITIES."

The former words might have left it in doubt as to who was to prosecute the claims, and who was to advance the necessary expenses of prosecution; but here the parties, in contracting that the American Trust Company shall be paid out of the proceeds the expenses of prosecution and sale, make it clear that it was intended that the trust company should prosecute the choses in action, and the trust company sell the securities.

The fact that instead of the covenanting word "shall," we have the colloquial "are," does not in the least militate against the effect of this language as a binding covenant.

Booth vs. The Cleveland Rolling Mill Co., 74 N. Y., 15, is a case in point.

That was a case of a written memorandum giving defendant an exclusive license to manufacture a patented article upon certain terms and conditions as to royalty, notice and keeping and rendering accounts; then followed stipulations on the part of the patentee, and then that the defendants "are to proceed at once "to make such rail so long as the said rail holds good "as a practicable and reliable rail for use." "And all rails to be made of good material and in a workmanlike manner."

Held, that the provisions quoted were covenants, not conditions; that for the failure to perform them an action was maintainable.

And ALLEN, Judge, says:

"There is no particular formula of words or technical phraseology necessary to the creation of an express obligation to do or forbear to do a particular thing or perform a specified act. If, from the text of an agreement and the language of the parties either in the body of the instrument or in the recital or reference, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for non-performance of which an action of covenant or assumpsit will lie" (*Id.*, p. 23). "In stating the duties and obligations assumed and the acts to be performed by them respectively, it is stated as it would be stated in colloquial language and in the present tense that the parties "are to" do or abstain from doing some other thing which, as the words are used, is the substitute for and equivalent of an express declaration and promise that the parties will perform the stipulations named. It is a written acknowledgment that the parties have, by their agreement, of which the paper writing is but the evidence, promised to perform the several acts named. The parties are only to do what they have agreed to do, and they are only to do it because they have undertaken and promised to do it; and when they say that, in the memorandum of the agreement, they are to do an act it can mean nothing less than they have promised and do promise, as stated.

"*Unless it be so there is no agreement, but a mere option.* The defendants, therefore, in becoming parties to the written agreement, in which it is stated that they are to proceed at once to make said rail, and to use all proper efforts and due diligence to introduce and sell the same, and in which it is also explicitly stated that under the license and agreement all rails are to be made of good material and in a workmanlike manner, have expressly promised in language that cannot be misunderstood to perform their stipulations; that is, to do that which they have said that by the agreement they were to do."

So, in this case, when the parties speak of "*proceeds*

*arising from the sale * * * and recovered upon said choses in action are to be applied to pay off said notes,*" they contract that each one of these things shall happen so far as their efforts in bringing about the result may be concerned. And when they go further and say that the proceeds are to be applied to the payment of the debt "*subject to the repayment of moneys expended by the American Trust Company in prosecuting claims or selling the securities*, they in like manner contract that the trust company shall prosecute and sell and expend moneys for that purpose to be repaid out of the proceeds expected to be derived.

The word "repay" implies a prior payment. There is no more "if" or condition in the manner in which these parties contract with reference to this repayment, than there is in regard to their contract in regard to the proceeds expected. As the proceeds could not be realized without the prior payment of expenses, and as they expressly contract for a repayment of these expenses out of the proceeds, there is a clear implication that the parties intended and contracted for the prior payment of these expenses by the trust company.

The express contract for this repayment out of the proceeds could not be realized without the prior payment and excludes the idea that a prior payment was not intended.

To a draughtsman unfamiliar with the law, and unfamiliar with the fact that the law would imply this repayment, this point might seem to be, and probably was, in his mind, the only point not thoroughly understood and requiring to be covered. It is an accident which happens sometimes to the most astute lawyers, to find that what they mainly intended to accomplish

in a covenant has all along, through careful attention to the expression of subsidiary details, been implied rather than expressed. This memorandum is a sample of a layman's similar blunder.

C.

Again the words "subject to the repayment" have a clear legal construction, and imply correlative promises. The word "pay" implies a debt.

Lent vs. Hodgman, 15 Barbour, 27.

A strong case of implied contract.

Where a deed from the mortgagor to the grantee reads, "subject to the payment of a mortgage," held, that it implies a covenant on the part of the grantee to pay the mortgage.

Jones on Mortgages, Sec. 749.

Citing:

Stebbins vs. Hall, 29 Barb., 524.
Carey vs. Fox, 38 Mich., 387.

So, in the assignment of a lease by the lessee, the words "*subject to the payment of rent reserved to lessor*" are an implied covenant on the part of the assignee to pay rent.

Burnett vs. Lynch, 5 Barnwell and Creswell, 8589, per DENMAN, J., and Woolveridge vs. Steward, 5 M & Scott, 561.

So in a contract to sell land. The vendor agreed to convey land to vendee, "*subject to the payment of the purchase money and interest*" *due from the vendor to the person from whom he bought.* Upon an action brought by the vendor against the purchaser for failure to pay

this money it was held: An implied covenant on the part of the vendor to pay the person who had sold to his assignor, and the action was sustained.

Campbell vs. Shrum, 3 Watts, 60.

See also Moore's Appeal, 88 Penn. State, 450.

Note.—That in some cases of deeds and assignments of leases the words "subject to the payment" have been construed as not amounting to an implied covenant by the vendee to pay, but as an exception intended to relieve the grantor against the operation of his covenants of warranty, against incumbrances, etc., contained in the deed. This construction is only held and sustained upon the ground that they can have effect on that construction in such cases as mere limitations of broad covenants; therefore, those cases have no application to the case in hand.

Again, the distinction between the words "subject to a mortgage" and "subject to the payment of a certain debt" was taken and applied in the case of Dingeldein vs. 3d Ave. R. R. Co., 37 N. Y., 575, 578.

There a transfer was made by a partnership to the defendants of their road franchises, horses, harness, &c., "*subject to the payment of all the money which the assignors were bound to pay on account of sewers.*

Held: "A covenant by the defendant to pay that claim," and that the whole clause was irrelevant and useless except upon such a theory.

Applying these authorities to the case in hand we find that the word "repay" implies the prior payment which was to be repaid, and that the words contained

a promise of Delos E. Culver to repay moneys expended by the American Trust Company out of the proceeds of the pledged property, and hence an implied promise on the part of the American Trust Company to pay out moneys to realize proceeds; and we bring the case directly within the principle enunciated by Justice CLIFFORD in the Canal Company case above stated:

"Where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a co-relative obligation on the part of the other party to do what is necessary on his part to enable the parties so contracting to accomplish his undertaking and fulfill his contract."

D.

Taking the case in hand and reading the memorandum in the light of the authorities above given we find the following to be the true construction:

The words "subject to the payment of moneys expended by said American Trust Company in prosecuting claims or selling the securities," constitute a promise on the part of Culver to repay out of the proceeds derived all moneys expended by the trust company in prosecuting claims or selling the securities."

"The whole clause would be irrelevant and useless except upon such a theory."

Dingeldein vs. Third Ave. R. R. Co., 37 N. Y., 575, 578.

This agreement of Culver, then, to "*repay moneys expended by the American Trust Company in prosecuting claims or selling the securities,*" *implies a correlative promise on the part of the American Trust Company to*

expend moneys in prosecuting claims and selling securities.

It would seem that the notion that the true construction of this memorandum is that it is optional with the pledgee to prosecute or sell, is founded upon the fact that the existence of proceeds being contingent upon the validity of the claims (at least one of which, the Opdyke claim, was in dispute and required litigation), so, in like manner, the intention to prosecute the claims and expend money for that purpose partook of the same contingency.

But this by no means follows.

While it is true that Culver's promise to repay expenses out of proceeds was contingent upon the existence of proceeds, and hence was conditioned upon the contingency of the validity of the claims, the correlative promise of the Trust Company to make these expenditures which were thus agreed to be repaid was in the very nature of things freed from the same condition or contingency.

The promise of the trust company, from its very nature, was independent of the realization of proceeds, for the reason that it must necessarily in point of time be performed before there could be any proceeds; hence, it could not have been intended to be conditional upon an event which could not happen until after the performance of the promise.

Since Culver is bound to repay out of the proceeds the moneys expended in prosecuting, and has no option, it is clear that the trust company is under the correlative obligation to expend moneys in prosecuting and has no option.

The proper construction of the memorandum in this

case is, therefore, that the trust company was under an implied obligation to prosecute claims and sell securities within a reasonable time and to expend moneys for that purpose.

The words "moneys expended in prosecuting claims " or selling securities" must be given some meaning; and, under the circumstances of the case, they amount to a covenant to prosecute and sell and advance the necessary expenses.

To read an option into the contract is to put in a new term, not expressed and never intended by the parties.

The parties have not said that the proceeds are to be distributed in this manner, *if the claims are prosecuted or if the securities are sold;* but in contracting with reference to the distribution of the proceeds they have clearly stated that there should be proceeds realized so far as action on their part was necessary to realize them.

And hence it does not lie in the mouth of the party who controlled the claims and the securities, and who by its non-action has prevented the realization of any proceeds to say, "I have not agreed to prosecute nor sell."

If no such agreement was made, or, if the parties did not intend a sale and a prosecution, the renewal of the discharged debt was without a valuable consideration, the assignment of the claims was a useless formality, and the whole transaction is meaningless. If they did intend and contract for a sale and a prosecution, the transaction becomes one consistent in its details with the ordinary motives and springs of human action, and

there is no question as to who was to sell and who was to prosecute.

The only party who could do so was the party who controlled the claims and securities.

In the case of Jones vs. Kent, above cited, the contract read, "*when sold;*" and yet the Court held that there was no option in the party who controlled the stock to sell or not, but that it was the implied intention of the parties that the stock should be sold at some time, whenever the price was above the amount named.

So here the contracting with reference to "*when proceeds are realized*" indicates a clear implied contract that "*proceeds shall at some time be realized.*"

Again, look at the action of the parties under this memorandum.

In the first place, we have the trust company taking up and prosecuting for two years or more the long and expensive litigation against Allen, Stephens & Co., resulting in a judgment of $25,000 (Rec., p. 62, fol. 119), the amount claimed with interest. This litigation cost $4,329.21; and although the defendants afterwards failed, about $6,000 was realized upon the judgment.

While of course the prosecution of one of the claims and non-prosecution of the two others is as consistent with the theory that the prosecution rested on the pledgee's option as with the theory that it was the pledgee's duty to prosecute, which it only partially performed, there is a circumstance connected with the payment of the expenses connected with the prosecution of this particular claim which throws light upon the construction put by the parties of this contract.

If the pledgees were under a duty to prosecute, the

manner and way, and the agents they should select for the purpose, and how they should pay them, was a matter of discretion with them. The pledgees from time to time paid the expenses of this prosecution apparently without any question or claim that they were under no duty to do so, until, at a certain point in the case, it became a question between the pledgor and pledgee as the the expediency of employing an extra counsel whose charge would be $1,000 of extra expense. The pledgor wanted it, the pledgee objected to it as too expensive, but the pledgor insisted, and finally the pledgee agreed to do so, if the pledgeor would give five notes for $200 each for the amount and "*agree to pay those notes outside of this matter*" (*i. e., promptly when due and not delay the payment of this advance, as all the other advance were delayed until repaid out of proceeds*).

Rec., pp. 57, 68, fol. 129.
Rec., p. 62, fols. 119, 120.

The fact that the trust company thus insisted upon a new and different agreement for the immediate repayment of an advance for the payment for services of an extra counsel, which they thus impliedly insisted they were under no duty to furnish, and yet made no similar demand in regard to the repayment of expenses they were actually incurring with their regular attorneys, clearly indicates that under the existing arrangement they considered themselves bound to make the usual and necessary, but not extraordinary, advances (a contention which is certainly the law of the case); and further indicates that Culver's credit with them was good, and that they were unwilling to do more than their contract called for. Their very demand upon

Culver to pay these extraordinary expenses himself is a practical admission that they felt themselves bound to pay the ordinary expenses; for, if not, they would have certainly then and there demanded that he pay all the expenses, and not merely the extraordinary expense which as pledgee they were under no legal duty to incur.

Again, when Culver requested that they prosecute the other two claims, he was not met with any refusal to do so on the ground of no obligation. On the contrary, on one occasion the officers said that "they wanted to see how the claim against Allen, Stephens & Co. turned out, as it cost so much money;" and at the last time they said "they had no money; that they were hard pressed for money" (Record, p. 60, fol. 116).

And then they went into insolvency and a Receiver was appointed—that officer who knows nothing and cares less about any contract of the company that is not a debt owing to the company. And so the Receiver sat upon the collaterals until they wasted away.

And so this suit arose.

PART THREE.

The law of the admissibility of oral evidence to contradict or vary a writing as applied to the case.

The rule is thus stated :

"Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

1 Greenleaf on Evidence, p. 322, S. 275, quoting Phil. & Am. on Evid., p. 753 :

"Nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence."

Stephen's Digest of Evidence (Chase's Edition, Article 90, p. 161).

And the same high authority states, among others, the following exceptions.

"Provided, that any of the following matters may be proved. * * *

"2. The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.

"8. If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates."

The rule is founded upon the following considerations :

"Not only from the danger of perjury, but from a presumption that whatever the parties at that time had in contemplation was all reduced to writing."

Bacon's Abridgment Evidence, G., p. 605.

Best thus states the rule:

"Oral evidence is inadmissible to contradict, vary or explain written written documents, except to explain ambiguities not appearing on the face of the documents themselves, to impeach the documents for duress or fraud, to show usage *or to establish a collateral contract.*"

Best on Evidence (Am. Ed. from 7th Eng. Ed.), p. 655.

And he states the reason of the rule to be *the presumed intention* to fully *embody the whole contract* in *the writing.* If not so intended, the rule does not apply; and, if the instrument does not fairly represent the whole agreement, the rule does not apply.

Best on Evidence, pp. 229–231.

The origin of the rule is lost in the obscurity of antiquity. Justice STEPHEN, in the preface to his admirable work on evidence, states that the law of evidence is composed of two elements, namely: an enormous number of cases almost all of which have been decided in the course of the last 150 years, and a comparatively small number of Acts of Parliament passed in the course of the last forty years.

Stephen's Digest on Law of Evidence (Chase's Edition), X.

So true is it that the law of evidence is of comparatively modern growth, that in the earlier law books, such as Glanville & Bracton, the law of evidence is not independently treated as such, nor can the word

"evidence" be found in the index, and, stranger still, in a book of the recognized authority of

Reeves' History of English Law, with notes by W. F. Finlason (London, 1869),

the word "evidence" does not occur in the index. In one of the earliest books on evidence,

Gilbert's Evidence (1795),

the rule now under discussion occupies only two pages, namely, Book II., Chapter VI., pages 311, 312. So far as the policy of the rule is founded upon the dangers of perjury, while it seems impossible to trace it from the earliest times, the researches of Maine and Holmes into the antiquities of our law have brought to light, facts in regard to its substantive rules which throw light upon the inception of the rule in question.

When executory oral contracts did not exist, or rather *were not enforced* in the courts, the rule could not have existed. How, within historic times, contract has slowly and painfully extended with the growth of mutual confidence among men, Maine has shown.

Maine's Ancient Law, Chapter IX.

And Mr. Holmes has shown that the ancient rule of law was: "By parol the party is not obliged."

Holmes' Common Law, 265.

This rule of evidence must therefore have come into existence after the relaxation of this more ancient rule of substantive law. The historical growth by which this ancient rule was finally abrogated is fully set out in the chapters of Maine and Holmes referred to.

In an ancient book on evidence, "Trials per Pais" (1776), the rule itself is not even referred to. It will be

noticed that the words "added to" do not appear in the first statement of the rule above given. This portion of the rule appears to have been introduced by Lord THURLOW.

See Bacon's Abridgment Evidence, G., p. 616.

The rule itself is severely criticised on principle, in so far as it excludes evidence of the true contract, not contradictory to the writing, by Bentham (5 Rationale of Judicial Evidence, London, (1818), 585, 596); and this writer's trenchant criticism on Lord BACON'S distinction between patent and latent ambiguities, has helped to make the modern authorities approach nearer and nearer to a complete overruling of Lord BACON'S dictum, drawing a distinction and barring oral evidence to explain a patent ambiguity (*Id.*, p. 589).

9 Abb. L. J., 281.

Cowen & Hill's notes, 1359, to Phillips' Evidence; and see cases hereinafter cited in Exhibit "A."

In the first American edition (1812) of Peakes Law of Evidence, the American editor says (page 117): "In the whole system of American law there is not a single point on which so many decisions have been made as on the following, viz.: How far parol evidence will be received to enlarge, narrow or contradict deeds or other written instruments."

Had the writer added a prophecy to the same effect, he would now be a prophet honored in his own land.

The English cases do not appear to be numerous; but so far as concerns the American decisions, their name is legion. In this Court the rule has usually been strictly enforced, but exceptions equally well re-

cognized have also been established. Thus parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered by the party obligor, by the party obligee, absolute on its face, was executed under the distinct understanding that it was to be of no effect unless upon consultation with other parties, the obligor was assured that the proceeding was lawful and the attachment for the full amount of both claims could be enforced.

Ware vs. Allen, 128 U. S., 590.

Citing :

Pym vs. Campbell, 6 Ell. & Bl., 370, 373.
Wilson vs. Powers, 131 Mass., 539.
Wallis vs. Littell, 11 C. B. (N. S.), 369.
Davis vs. Jones, 17 C. B., 625.

And following :

Pawling vs. United States, 4 Cranch, 219.
See *contra*, 18 How.

But this Court has not, in any case, yet passed upon the exceptions to the rule herein contended for by the plaintiff in error. The cases are so numerous that it would be utterly impossible to take them up and discuss them *seriatim*. There is great conflict among them, and it is impossible to reconcile decisions in different jurisdictions and sometimes in the same State.

Appendix A, *supra*, contains, arranged under headings showing the nature of the exception claimed, and the ruling of the Court thereon, all the cases decided in America from the earliest date, so far as contained in the United States Digest and its supplements down to date. From the list have been omitted certain cases

in which no true exception could fairly be claimed, because the oral evidence offered simply amounted to a contradiction of the writing. To each case is appended a short memorandum sufficient to indicate the nature of the question passed upon.

An examination of these decisions, involving, as they do, the application of the rule or one or more of its alleged exceptions to particular classes of facts, brings out in clear relief the following truths:

1st. That the now well-recognized exceptions to the rule are, if anything, of more importance than the rule itself.

2d. That these exceptions have to a large extent canceled that portion of the rule which says that a written agreement cannot be "added to," while at the same time the rule that a written agreement cannot be "contradicted, varied or altered" as to any matter embraced in the writing covering the contractual intentions of the parties, is established on a firmer basis than ever.

3d. That in the application of the rule and its recognized exceptions to concrete facts, an irreconcilable conflict exists among the authorities upon the following points:

1st. Where a contract is evidenced by a written memorandum of sale, can an oral warranty be proved as collateral to it?

2d. Where an agreement of lease *inter partes* has been entered into with apparently full covenants, can

an independent covenant on the part of either party relating to the subject matter be proved by oral evidence?

3d. Where the parties have contracted for the sale or lease of a business, can an oral covenant of the vendor not to carry on business in the vicinity for a certain length of time be proved?

4th. Where there is a deed of land, can an oral reservation of a crop or buildings be proved, or can the oral promise of vendor or vendee to assume liability or pay off a lien on the land, be proved against the covenant of warranty or against encumbrances?

5th. Where the contract, as signed, results in a legal implication of liability of a certain character, can the legal implication be contradicted or varied by parol: (*a*) as to endorsers; (*b*) as to proving the true relation between parties signing the instrument as being principals or sureties, etc., although not mentioned therein; (*c*) as to proving an agreed time of performance, although the law implies a reasonable time?

6th. When a note or bond is given, can an oral agreement that it is only payable in a certain manner or way be proved?

At the same time the foregoing cases establish that the rule that oral evidence is incompetent to alter, vary, contradict or add to a written instrument has at least six well-recognized exceptions, apart from the exceptions coming under the jurisdiction of equity. These are:

1st. The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract, grant or disposition of property.

2d. When it proves that the document embraces but a portion of the entire contract made, and the oral part attempted to be proved covers a matter on which the document is silent, and which is not inconsistent with any of its terms.

3d. Oral evidence is admissible to contradict or vary the terms of a written instrument; *(a)* as to its date (except any attempt to show by a change in date that the instrument is invalid); *(b)* the true consideration, except where this proof involves contradiction of any express covenant in the instrument, or to prove the instrument invalid for lack of consideration; *(c)* evidence to show the relations of parties to the instrument on the same side as between each other.

4th. Oral evidence of the whole contract where, upon its face, the written memorandum is incomplete or refers to the existence of an agreement as to some one else.

5th. When the written memorandum, when applied to the subject matter, produces ambiguity *(a)* as to the character, nature or identity of the object contracted about; *(b)* as to the identity of the party contracting to do the act; *(c)* as to what were the particular things contracted to be done; *(d)* as to whether the covenant to do the thing was imperative or optional.

In view of the rule, its exceptions and the conflict of

authority as to the application of both to particular facts, it is proper to investigate, on first principles, the reason of the rule and its exceptions, in order to ascertain whether it is possible to reduce this branch of the law of evidence to a logical system of a rule and exceptions based upon principle, or to frankly admit that it has no foundation other than chaos.

The reason of the rule is stated to be, the presumed intention of the parties to embody in the writing the whole contract, and the danger of perjury. The two reasons should be clearly distinguished, because they lead to different results in applying the rule to facts. Thus, so far as the danger of perjury is concerned, an easy test to apply to any individual case would be, first, does the oral evidence offered contradict or vary the undertaking set up in the writing as to any matter covered thereby—if so, the rule should be applied ; for in this case only, would perjury be dangerous ; second, is the oral contract desired to be proved, while not contradicting or varying the terms of the writing, one which, if standing alone, could be proved by parol as an independent contract. If so, the rule would not be applied. *Contra*, if such a contract would come under the prohibition of the Statute of Frauds or similar rule of public policy.

The reason of the rule barring oral evidence founded on possible perjury, would therefore only apply to sustain that part of the rule which says that oral evidence is incompetent to contradict or vary a writing.

On the other hand, the reason of the rule, grounded upon the presumed intention of the parties to embody the whole contract applies against oral evidence adding to the contract as well as that contradicting, alter-

ing or varying it; but, since this ground of the rule is based upon a presumed intention that the writing embodies the whole contract, it is evident that distinctions must, in principle, be drawn between documents formally drawn and executed and mere imperfect memoranda. Thus where the writing is signed by one party alone, containing only his stipulations, the stipulations of the other party may be proved by parol.

(Cir. Ct., Dist of La.), Lafitte vs. Shawcross, 12 Fed. Rep., 519.

Routledge vs. Worthington, 119 N. Y., 592.

Curtis vs. Soltan, 34 St. Rep. (N. Y.), 767.

Tocci vs. Arata, 35 St. Rep. (N. Y.), 42 S. C., 12 N. Y. Supp., 287.

Again, oral evidence is admissible to vary, etc., to incorporate other writings referred to. See cases cited in note to report of

Bradley vs. Washington, Alexandria & Georgetown Steam Packet Co., 10 Lawyers' Co-operative Publishing Co., U. S. Supreme Court Reports, p. 72.

Or by incorporating writings made substantially at the same time and parts of the same transaction though not referring to each other.

Barker vs. Bradley, 42 N. Y., 316, 319.

Bailey vs. Hannibal & St. Joseph R. R. Co., 84 U. S., 96.

Thus, where the written contract refers to an oral

arrangement, the presumption is rebutted and the oral evidence is admissible.

Commissioners vs. McCalmont, 3 Penn., 122.
Couch vs. Meeker, 2 Conn., 305.
Hunt vs. Livermore, 5 Pickering, 395.
Sharpe vs. Lipsey, 2 Bail., 113.
Work vs. Beach, 59 Hun, 625.

Under this exception it is not necessary that the incompleteness of the writing should appear upon the face of the writing; it is sufficient if all of the circumstances indicate that it was not intended to be the complete expression of the contract. This exception is thus expressed: "Where a writing evidently appears to express only some parts of an agreement entered into between the parties, parol evidence, it seems, would be admissible to prove the other parts of the agreement on which it is silent."

2 Phillimore's Evidence, 772, 8th London Edition.

Another authority states the exception in this way: "And even in those cases where the parties have made a formal agreement in writing with the intention of being bound by its terms, if, from the circumstances of the case, the Court infers that they did not intend the writing to be a complete and final statement of the whole transaction between them, evidence may be given of any separate agreement as to any matter on which said writing is silent and which is not inconsistent with its terms, for this is neither contradicting nor varying the terms of the writing, but only proving the con-

temporaneous agreement collateral to and not inconsistent with it."

Reynolds on Evidence, 99.

By the modern decisions this exception has become firmly established, and especially is this so in England.

Thus, where, in a negotiation for the sale of a business, the parties entered into a written agreement for the sale and purchase containing a clause, "in the meantime Lindley authorizes Lacey to settle the action (Chase vs. Lindley), and also pay rent now due to Mr. Phythian, such payments to be on account of the £145 (the purchase money) and form part of the same."

It was held that a contemporaneous oral agreement, that if the plaintiff would sign the writing the defendant agreed to settle the Chase action, was competent.

(1864) Lindley vs. Lacey, 17 C. B. (N. S.), 578.

The brief of counsel for the plaintiff in this report contains a fine abstract of the prior English cases on the question.

Byles, J., said, page 587:

"If evidence may be given of an oral agreement which affects the performance of a written one, surely evidence may be given of a distinct oral agreement upon a matter with respect to which the subsequent agreement is altogether silent; more especially if, as here, in addition to its being a stipulation, it was a condition."

Earle, C. J., page 586, says:

"It is clear, therefore, that if there be a distinct collateral oral agreement between the parties, it is immaterial whether it precede or is contemporaneous with the written agreement," and "if the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to in-

troduce a term which does not appear there, but if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit it," etc.

Note that this case cannot be sustained on the exception established in

Wallis vs. Littell, 11 C. B. (N. S.), 368.

namely, that oral evidence is competent to prove that an instrument delivered on condition that it should not take effect except upon the consent of a third party (in analogy to the delivery of a deed as an escrow); because in that class of cases, the party attacks not the terms of the instrument as correctly expressing the contract, but the validity of the delivery as a delivery, and claims that the instrument has not become a binding contract; while in the foregoing case the plaintiff affirmed and stood on the written contract as valid as far as it went, and claimed under an additional oral stipulation adding to the terms of it. The decision is however correct because, in principle, there is no more danger of perjury in proving an oral condition on which a contract is to become operative than in proving an oral additional stipulation independent of the contract and not inconsistent with its terms. Curiously enough, while the Judges say that the written contract is silent as to the matter on which the oral stipulation was proved, the fact is otherwise, as the clause above mentioned gave an authority to the defendant to settle the outstanding Chase litigation, while the oral stipulation proved, made, what was a mere authority

under the written contract, an imperative duty under the combination of the two.

The rule barring oral evidence, so far as it contradicts or varies the writing, is, however, strictly enforced in England. Thus, on a lease of a house and furniture, oral evidence that the lessor agreed to put in more furniture was rejected.

Angell vs. Duke.
32 Law Times, 320.

And where an attempt was made to prove an oral contract the drawer of a bill of exchange should not be held liable upon it until securities held as collateral were sold and applied on it. The evidence was rejected.

Abbey vs. Crux, 5 C. P., 37.

Another example of the same exception is as follows:

There was a written lease between the parties containing a clause that the tenant agreed not to sport on the land, but to preserve the game, and the landlord and his friends had permission to hunt over the same. An action was brought by the tenant against the landlord for breach of an alleged oral agreement, made at the time of the signing of the lease, that the lessor should destroy the rabbits on the premises. It was proved that the lessor refused to have this clause put in the lease, and the tenant signed on his oral stipulation. Held, the stipulation was collateral to the writing and not in conflict with it, and admissible.

Morgan vs Griffith (1871), 6 L. R., Ex. 70.

The Court may infer, from the surrounding circumstances and the nature of the contract as being in-

formal or silent upon an apparently necessary point, that the writing is incomplete, and that oral evidence is admissible under this exception. The following are examples:

Thus, in one of the earliest cases, upon the hiring of a horse, the memorandum read: "six weeks at two guineas.

WILLIAM WALTON, JR."

Lord ELLENBOROUGH held, oral evidence as to the real contract, outside of these terms, was admissible, namely, that the hirer agreed to be responsible for all accidents caused by shying, etc.

Jeffrey vs. Walton, 1 Stark., 267.

So, where an entire contract was not required to be in writing, and the writing was incomplete, embodying only a part, oral evidence of the other portion was allowed.

Loibel vs. Strampfer, 16 L. P., 720.

So where there was endorsed on the contract a memorandum to this effect "by agreement of parties this contract is satistied," it was held that oral evidence of the whole consideration was admissible, namely, suits, arbitration, exceptions and claims, etc.

Hall vs. Mott, Brayt, 81 (Vt.),

So a mere bill of parcels does not exclude oral evidence of the true contract.

Hazard vs. Loring, 10 Cush., 267.
Filkins vs. Whyland, 24 N. Y., 338.
Crosby vs. The Del. & Hudson Canal Co., 128 N. Y., 641, 643.

So where a writing read, "Steamboat 'Alida' purchased this day of the Delaware & Hudson Canal Co. 500 tons of lump coal, to be delivered at Rondout at $4.62 per gross ton, less 12½ cents per ton for cash to August 1st; also 1,000 tons of lump coal, to be delivered from yards in New York at $5.00 per ton; to be delivered by carts July 12, 1847, William R. McCullough,

It was held, that as far as the course of the dealing between the parties was competent to show, that the coal was to be delivered in installments, and not altogether.

"The Alida," Abb. Adm., 173.

In this case there is an elaborate citation of authorities sustaining the admission of oral evidence where the writing incompletely expresses the contract.

So, again, in

Potter vs. Hopkins, 25 Wend, 417.

The writing read "Received of H. S. Potter $500 as advance on my wheat to be delivered before the 1st of July, at Rochester price." The defendant having refused to deliver the wheat, plaintiff brought suit alleging an agreement to deliver 1,000 bushels, to be paid for—$500 down and balance on delivery of wheat.

The evidence was held competent.

NELSON, C. J., says, page 419: "The instrument in question does not purport on its face to be a complete agreement between the parties, and if it may rest in parol, there can be no objection to the suppletory evidence given in the case.

The authorities on this point are well collected in

Collin & Hills, pp. 1471-3.

It was obviously given as an acknowledgment of part execution of a contract referring to some of its terms, which I agree are binding as far as they go."

Again, where, at the time of a negotiation between the parties for a sale by plaintiffs to defendants of certain goods, plaintiffs gave defendants a writing which acknowledged the receipt of an order for the goods and stated the time and the delivery and the price, it was held that the defendants were not estopped thereby from proving a parol warranty as to the quality. That the instrument could not be construed as being the whole contract between the parties, but simply a memorandum. That even if it could be construed as embodying a part of the agreement, and so conclusive as to that part, oral evidence was competent to show the rest.

Brigg vs. Hilton, 99 N. Y., 526.

The only distinction between this case and that of

Eighmie vs. Taylor, 98 N. Y., 288,

wherein an oral warranty that the oil wells sold under formal and complicated written documents were yielding at the time a specified quantity of oil, and also sufficient gas to furnish fuel for the works, was excluded under the rule, is the difference in the apparent completness of the writings entered into as embodying the whole contract.

Where a writing is entered into between parties, silent as to a matter which from the surrounding circumstances of the case, was one to be naturally included in their contractual intention, the Court may presume the writing incomplete and allow oral evidence as to such matter.

Thus, where there was a written agreement providing for a nonsuit, in a land suit, upon an agreed default to be made by the plaintiff, and the writing was silent as to costs, such agreement does not exclude oral evidence that the defendant in the land suit paid the costs upon an agreement that, if he did so, no new suit would be brought.

Dana vs. Taylor (Mass.), 22 N. E. R., 65.

And where there was a written agreement to compromise a suit silent as to costs, an oral agreement as to who was to pay the cost, was held competent.

Morancy vs. Quarles, 1 McLean, 194.

Again, in

Ferguson vs. Baker, 116 N. Y., 257,

upon a dissolution of a partnership, the parties endorsed on the articles as follows :

" By mutual consent of the parties to the within agreement the partnership thereby formed is wholly dissolved ; the within George Baker is authorized and consents to settle all debts to and by the firm. Dated the 23d day of July, 1885.

JOSEPH G. FERGUSON. [L. S.]
GEORGE BAKER. [L. S.]

Held, oral evidence was competent to prove that the parties were formerly partners ; that the partnership had been dissolved and a settlement made ; that Baker had agreed to collect the debts due the firm, amounting to a sum specified, and, as soon as collected, to pay over to plaintiff his share, *i. e.*, one-half thereof (incomplete mem.).

The Court, in arriving at this conclusion, say: " Now,

as to the evidence introduced upon the trial to prove the facts to the jury, it was objected that this proof of the settlement and promise to pay being mainly verbal and outside of the written agreement of dissolution, could not be introduced; that it was to be considered that it was merged in it or was contradictory of it." This position is totally untenable in either aspect (Finlay vs. Fay, 96 N. Y., 663; Brigg vs. Hilton, 99 *Id.*, 517; Chapin vs. Dobson, 78 *Id.*, 74). The articles simply provided for a dissolution of the firm and which of them should collect the outstanding debts due the firm, a power which either might exercise by law, and without an express agreement.

The agreement did, and was doubtless intended to do, no more than to dissolve the copartnership and to terminate their relations as copartners, and to announce the fact to the persons dealing with the firm, and to the public. There was no occasion in the article of dissolution to state as between themselves nor as to the public whether or not they had settled their partnership affairs, or how they had settled them. The settlement or division had been consummated contemporaneously with the agreement of dissolution. Just *when* is of no moment, so long as it was an accomplished fact. It should not therefore have been in the agreement of dissolution. Nor is it in any sense contradictory of it. It was entirely distinct from the agreement. That agreement is *one* thing. How their partnership affairs should be settled and closed quite *another*.

So where Cooper in New York drew upon Glasgow merchants for £5,000 to mature February 29th, and February 26th, bought of the bank in New York which had an office in London a cable transfer of this amount

in favor of the Glasgow merchants, to be transmitted in a check by post from London to Glasgow, and received a bill in the following words:

"W. B. Cooper, Jr., Dr., to the agents Bank of British North America, 52 Wall street, for cable transfer on the Bank of British North America, London, in favor of Martin, Turner & Co., Glasgow, 5,000 pounds, at:

4.90½	$24,525
Cost of cable	2
	$24,527"

The bank, in London, having deposited the amount in another bank to credit of the Glasgow merchants instead of forwarding it, whereby, through the failure of the bank in which it was deposited, the money to take up Cooper's 5,000 draft maturing February 29th was not forthcoming, and he had to take it up, was sued by Cooper, and on the facts presented the bank claimed that the above memorandum was conclusive and the part of the contract as to transferring from London to Glasgow being oral, could not be proved.

Justice BREWER, in writing the opinion of this Court, says:

"The mere receipt of a bill of parcels or bill of lading on payment of money or delivery of goods is not necessarily an assent to the proposition that such bill of parcels or bill of lading states the contract and the whole contract between the parties. Such bills may or may not be the contract. They may be nothing more, and intended to be nothing more, than memoranda or receipts. Whether they are the entire contract or simply in the nature of receipts is not a question of law for the Court, but one of fact for the

jury. The case of Mobile and Montgomery Railway Co. vs. Jurey, 11 U. S., 584, is suggestive. There on a shipment of goods it was insisted that a bill of lading voiced the entire contract. The trial Court opened the door to inquiry as to the terms of the real contract between the parties and the circumstances under which the bill of lading was given and received, and left it to the jury to determine whether the bill of lading was or was not the contract. The ruling of that Court was affirmed by this. We think, therefore, there was no error in denying this motion, and and leaving the question of fact to the determination of the jury. Even if inquiry were limited to the bill itself, the description of the place, Glasgow, therein certainly suggests that delivery was intended at that place, and may not unreasonably be construed as meaning not merely that it was the place of business of Martin, Turner & Co., but also the place to which the money was to be remitted."

Filley vs. Pope, 115 U. S., 213.

The Court therefore held the evidence admissible in that case, because the writing was incomplete upon the face of the transaction and the surrounding circumstances in expressing the contract, and as being ambiguous in regard to an essential point upon which the minds of the parties must have met, namely, whether the contract was to transmit the money to London or to Glasgow.

In the cases cited under subdivision IV. in Appendix A are contained a number of authorities in point sustaining the principle above stated.

Thus, where a written contract for a commission to be paid in obtaining a loan did not specify within what time the loan should be obtained, oral evidence was held to be competent.

Roberts vs. Matthew, 77 Ga., 458.

In fact this exception is as old as the principle itself. Thus in

Preston vs. Merceau, 2 Bl., 12, 49,

which apparently was a lease by an informal document of about three lines, specifying that one party let to the other a house for a term specified at £36 per annum, the lessor tried to prove that the lessee agreed to pay, in addition for ground rent, £2 12 shillings and 6 pence per annum. Oral proof of this promise was excluded and

BLACKSTONE, J. (1250), says: "We can neither alter the rent nor the term, the two things expressed in this agreement. With respect to collateral matters it might be otherwise, he might show who is to put the house in repair or the like, concerning which nothing is said."

Again, where the question was whether a signature to a contract was as principal or agent, the contract containing a guarantee on behalf of the agent for the principal, oral evidence of statements of the defendant that he intended to sign on his own behalf as well as for his principal was held to be competent.

Lowry vs. Schouler, 11 Q. B. Div., 651, 49 L. T., 546.

So where the action was on a sealed instrument promising to pay, but stating no payee, oral evidence was held to be competent to identify the person claiming on the instrument as the payee intended.

Berkeley vs. Tarrant, O S. C., 574, 47 A. M. Rep., 853,

And in Exhibit A, under Subdivision III., a large number of cases is cited where oral evidence has been admitted to clear up an ambiguity in the contract

arising from its too short expression of the intention of the parties.

Cases which are really also cases under the rule of the contract being incomplete, such as

Stoops vs. Smith, 100 Mass., 63.

Where in a written contract for advertising, oral evidence of stipulations as to the kind and size of the card to be published was admitted.

Brown vs. Doane, 86 Ga., 32:

Where there was a writing agreeing to pay for land when the vendor put in the hands of the vendee a chain of title from the state to the vendee, it was held, that whether the vendor was under duty to make efforts to procure such a title was ambiguous, and oral evidence was competent.

II. From the foregoing and the cases cited under Subdivision III. and IV. in Appendix A, it will be noted that, as is usual in law cases arising at the present time, the main question presented is not the existence of the rule or the exceptions claimed, but which of them applies under the facts in the present case. In other words, the question is not whether all men are mortal, but whether Socrates is a mortal.

Looking at the contract in the light of those decisions and at the surrounding circumstances in the case the following conclusions are apparent: In the first place, as has been admitted, there is no express contract to prosecute. In the second place, there is no express contract that whether the prosecution shall occur or not shall be optional with the pledgee. Unless the language used implies as argued in part two a covenant on the part of the pledgee to prosecute claims

and sell the securities, the only construction to be placed upon the document is that it is silent upon the points of whether there is a duty to prosecute or sell, and, if so, by whom. In the light of this necessary conclusion and of the surrounding circumstances it therefore becomes apparent that in this case the writing is incomplete and partial, and does not fully express the contractual intention of the parties, being silent upon a point which would naturally be contracted about, and in regard to which undoubtedly in some way the minds of the parties must have met. This therefore is a case coming clearly within the exception and not the rule, and oral evidence is competent to fill out and complete the contract. This conclusion is strengthened when an inspection of the writing shows that it is primarily a receipt and nothing else, and in expressing so far as it expresses any contract, nothing but a portion of the legal conclusion to be derived from the receipt of collaterals, it seems to class itself naturally among those informal memoranda, such as receipts, bills of parcels, due bills and the like as to which the rule has always been relaxed.

The defendant in error, in sustaining his case, is confronted by the following dilemmas: Either the writing expresses a complete contract or it does not; if it expresses the complete contract it can only do so by contracting with reference to what was to be done with the choses in action and the securities. It contains no express contract in relation to this matter; if any is implied, there can only be implied from the language used a duty to use the proper efforts to bring about the contingency in regard to which the parties have expressed their contractual intentions, and if this is the

case, there is an implied imperative duty on the pledgee to prosecute the choses and sell the securities and no option to do so is expressed or can be implied from the contract as actually expressed in the writing. The result would be that the plaintiff is entitled to a reversal on the point that he had the right to go to the jury on the facts as they stood on the close of the trial.

If the writing does not contract with reference to the duty to prosecute or sell whether optional or imperative, then it is upon its face and in view of the surrounding circumstances an incomplete expression of the contractual intention of the parties. For a contract in relation to that matter was a substantial object of the transaction. Oral evidence is therefore competent to prove this portion of the contract, and the plaintiff is entitled to a reversal for its exclusion.

In all that has been said counsel is arguing merely in favor of the 4th assignment of error (Rec. pp. 78–83, fols. 148–158).

This assignment amounts to an offer to prove that at the time the memorandum was made the trust company agreed to prosecute the claims against Opdyke and against the N. Y. & O. Midland R. R. Co., and to advance the expense of such prosecution (Rec. 83, fol. 157, p. 81, fol. 153).

The 5th assignment of error (Rec. pp. 83–85, fols. 157–160), wherein is involved an offer to prove that the trust company agreed to sell the bonds or exchange them in reorganization proceedings pending and pay the installments required for the exchange, stands upon an altogether different footing

The oral proposed proof as to the promise to prose-

cute in no manner contradicts, alters or varies any part of the writing as entered into. It merely adds to it an additional stipulation upon a matter on which the writing is silent, and upon a matter in regard to which the silence of the writing indicates its incompleteness.

The oral proof as to the promise to prosecute the claims is, therefore, a case coming clearly within the acknowledged exception to the rule above stated, and does not contravene any positive rule of law or any public policy involved.

The contract offered to be proved is one which is not within the Statute of Frauds or any other statute requiring a writing, and would in this oral form have been good and valid if there had been no writing at all in the case. There is therefore in the admission of proof of this oral promise to prosecute no danger of perjury greater than exists under the usual rule of the allowance of such a contract to be given by parol without a writing. The oral evidence offered, therefore, does not impinge upon either of the reasons for the rule, and in the absence of the reason the exception is established.

For the reason above given the Court erred in view of the facts proved, and the surrounding circumstances in excluding oral evidence that prior to and at the time of the memorandum of February 24th, 1876, was made, the trust company verbally agreed to prosecute the claims and advance the moneys needed.

In regard to the 5th error assigned by the plaintiff in error, namely, that the Court erred, under the circumstances proved, in excluding evidence on the part of the defendant that the trust company verbally agreed to sell the securities or exchange them under reorganization pending for new securities of the reorganized

company and pay the installment required therefor, counsel is compelled to admit that, in view of the decision of this Court in Bast vs. The Bank, it would seem that there was no error in excluding the evidence, under the circumstances.

The agreement to exchange for new bonds is, to a certain extent, inconsistent with the agreement contained in the writing to sell the securities. If it is absolutely inconsistent, it, of course, falls within the rule and not within any exception to it, and there was no error in excluding it. The only possible ground upon which it could be claimed that the oral evidence in question would fall within any exception would be to claim that it was an alternative promise, namely, "to sell," and then, "or to exchange them for new bonds and sell."

In the Bast case the attempt was to prove, under a writing which meant "the bank should not, before the maturity of the notes, take measures to collect the judgment assigned without the consent of Bast," that the bank had agreed to issue execution upon the judgment and proceed to collect the same whenever the money could be made thereon. This oral contract was held to be in contradiction of the writing and hence inadmissible.

On the whole, counsel is of the opinion, that where the parties have expressed an intention in writing to do a certain thing, oral evidence of a promise in regard to that very thing to do something else in the alternative is inadmissible as being within both reasons of the rule, namely, the danger of perjury as to a certain extent contradicting the writing, and also from the presumed intention of the parties when they contract with

reference to a thing, and something to be done in regard to it, that they have covered the whole of the intention when they express one branch of an alternative, and to admit an alternative contract would be to let in all the dangers provided against by the rule.

It is true that a number of cases can be found in the books that would sustain such a contention, but it is deemed that they are unsound in principle.

PART FOUR.

The law of judgments and set-off as applied to the case.

There remains only one other law question in the case. This arises on the exception by the plaintiff below to the refusal of the Court to rule out the pleas of recoupment, set-off and counterclaim, set up in the answer, and give judgment for the plaintiff (Rec., p. 36, fol. 73). The only possible grounds upon which this contention could be defended are as follows :

1st. In an action on the principal debt a set-off or counterclaim arising from negligence in respect to collaterals is not admissible.

2d. At any rate, the judgment on the principal debt merges the collaterals and all claims arising out of them.

3d. The Receiver does not take the principal debt subject to these offsets.

4th. The offsets are only available in equity and not at common law, and are not available in the United States courts at law.

As will be shown below, each of these alleged grounds is invalid, because the statement of law contained in each is erroneous.

The judgment is founded chiefly on renewals of the notes mentioned in the memorandum of February 24th, 1876.

This wonderful memorandum, which by fiction of law was held by the Court below to contain *the whole of the entire contract and transaction* between these parties, is so wofully incomplete that at the outset it does not state the consideration, or indeed any consideration, for the notes recited.

The fact that part of the true consideration was the renewal of the old debt discharged in bankruptcy, and part was composed of a new loan of $5,000 for the specific purpose of a purchase of specified property immediately included in the pledged property, must all be proved outside of the memorandum.

Luckily for the defendant below, proof of the actual consideration is now pretty generally admitted, in spite of the rule barring oral evidence to vary a writing.

A question could be raised whether judgment having been obtained upon the debt the true consideration could be shown. This, however, is also well established.

A.

THE ORIGINAL CONSIDERATION OF THE NOTES UPON WHICH THE JUDGMENT WAS OBTAINED CAN BE INQUIRED INTO FOR THE PURPOSE OF THIS DEFENSE.

Wyman vs. Mitchell, 1 Cow. R., 316.
Betts vs. Bagley, 12 Peck., 572.
Clark vs. Rowling, 3 N. Y., 216, 220.

See also

O'Brien vs. Young, 95 N. Y., 428.
State of Louisiana vs. City of New Orleans, 100 U. S., 285.
Greene vs. Republic Fire Ins. Co., 84 N. Y., 573.
Blount vs. Windey, 95 U. S., 173.

In the State of New York, where this action was tried, damages arising from conversion, etc., of property pledged, is a valid counterclaim to an action on the principal debt, and it is a legal, not equitable, cross-action.

Cass vs. Higenbotam, 100 N. Y., 248.
Levy vs. Loeb, 47 N. Y. Super. Ct., 61.
Weston vs. Turver, 1 N. Y. Supplement, 807; Sup. Ct., Gen. T., 5th D., 1888.

This is also the law of New Jersey, where the judgment on the principal debt was obtained.

Donnell vs. Wyckoff, 49 N. J. Law, 48.

See also

Bank of British Columbia vs. Marshall, 11 Fed. Rep., 19.
Jones on Pledges, S. 595.

And this is also the law as declared by this Court. A claim for the conversion of collaterals is a legal offset to a suit on the debt.

Allen vs. St. Louis Bank, 120 U. S., 20, 31.

B.

JUDGMENT ON THE PRINCIPAL DEBT DOES NOT MERGE OR AFFECT SET-OFFS OR COUNTERCLAIMS ARISING OUT OF NEGLIGENCE IN REGARD TO THE COLLATERALS.

1ST.

In setting up this claim of merger, it is necessary for the defendant (assuming that the defense of damages arising out of negligence in regard to the pledged property is a *defense proper* and not a *cross claim*) to prove that the defense existed at the time he brought suit on the principal debt.

Not only can this not be done, but on the face of the record the contrary appears.

If these defenses or set-offs or counterclaims did not then exist as full-fledged defenses or set-offs or counterclaims, there was and could be no merger.

In the case in hand the set-offs, recoupments and counterclaims set up in this case were not due when suit was brought on the principal debt.

The contract of pledge was made February 24th, 1876.

The judgment on the principal debt was obtained May 31, 1879 (Rec., p. 18, fol. 34).

At that time there could have been no defense to the principal debt by reason of neglect to sell the securities or neglect to prosecute, for the reason that the causes of action therefor had not then accrued.

AS TO THE SECURITIES, a reasonable time had not elapsed in that, the reorganization was not completed until 1880 (Rec., p. 47, fol. 92). The bonds in 1879 had a market value (Rec., p. 68, fol. 130), and since not

only negligence but *also damage must be shown in order to make out a cause of action on such a claim*, this set-off had not not then arisen (see Hanna vs. Holton, 78 Pa. St. and cases cited below). The complete loss which constituted the damage, which is the gist of the action, did not occur till 1880. In 1879, *non constat*, but that the securities were and would be of value, *and at that time no notice* or request to sell had been given, such notice was not given till 1880 (Rec., p. 68, fol. 30).

AS TO THE CHOSES IN ACTION.

AS TO THE CLAIM AGAINST THE NEW YORK AND OSWEGO MIDLAND.

When the action on the principal debt was pending in 1879 the set-off arising from the failure to prosecute the claim against The New York and Oswego Midland R. R. Co., had not arisen.

There then existed only a neglect to prosecute. The claim was on a contract under seal (Rec., p. 51, fol. 99), dated July 15, 1871 (Rec., p. 54, fol. 104).

The claim was not barred in 1879, because, although a sale took place under the foreclosure Nov. 14, 1876 (Rec., p. 74, fol. 140), the same was not confirmed until January 6, 1880 (Rec., p. 74, fol. 140), and pending that time, under the reorganization plan, judgment could still have been obtained against the road, and if obtained, would have been worth in the open market from $3\frac{5}{8}\%$ to $14\frac{1}{4}$ of their par value (Rec., p. 73, fol. 139); and the stock and mortgage bonds of the road had a market value down to the time when the purchasers took possession and control in 1880.

Hence, the damages from the neglect to sue, viz., the loss of the value of the claim, did not occur till the expiration of the time, under the reorganization agree-

ment, to exchange stock and bonds of the old company and judgments against it for interest in the new. When that time expired, which was the first day of March, 1880 (Rec., p. 73, fol. 139), any floating claim or judgment became valueless for all purposes; and then only the substantial damage, which is the gist of such a cause of action, arose.

Before that time, and in 1879, pending the Receiver's suit, there existed only a neglect to prosecute and no loss; because, *non constat* but that the pledgee might still realize upon it by suit.

See Hanna vs. Holton, 78 Pa. St., and cases cited below.

A.

AS TO THE CLAIM AGAINST GEORGE OPDYKE.

This was a simple contract claim. It does not appear in the record at what date the refusal to turn over the bonds occurred (Rec., p. 52, etc.); but as this refusal was the cause of Culver's failure—and he failed in Sept. 23, 1873 (Rec., p. 38, fo,. 76)—it would appear that the cause of action arose about that time, and hence was not barred in March, 1879.

In taking this objection, that the judgment bars the claim, the burden of proof is on the plaintiff to prove that not only the neglect but *the damage*, which is the gist of the cause of action, had occurred in 1879. This he cannot do on this record, since the claim was valid till the Statute of Limitations ran against it and Opdyke good for it; there was merely a neglect to prosecute and no damage when the Receiver sued in

1879; *non constat* but that he might subsequently sue and recover, *the claim was not yet lost.*

At the same time, the fact that the Statute of Limitations had run against the Opdyke claim when this action was brought appears from the record.

The *præcipe* was filed Dec. 3, 1883 (Rec., p. 33, fol. 5).

The claim was in existence Feb. 24, 1876 (Rec., p. 39, fol. 78); hence the six years had already run.

IT IS WELL SETTLED THAT NOT ONLY NEGLIGENCE BUT DAMAGES ARISING FROM SUCH NEGLIGENCE MUST BE PROVED; A MERE NEGLECT TO PROSECUTE IS NOT SUFFICIENT TO CONSTITUTE THE CROSS-CLAIM.

Aldrich vs. Goodell, 75 Ill., 452, 456–7.
Lawrence vs. McCalmont, 2 How. (U. S.), 426, 454.
Gilbert vs. Marsh, 12 Hun, 519.
Vose vs. Yule, 4 Hun, 628.
Herrick vs. Borst, 4 Hill, 650, 653.
Kennedy vs. Rozier, 71 Iowa, 671.
Steger vs. Bush, 1 Smedes & Marshall (Miss.), 172.
Powells, Adm. vs. Henry, 27 Ala., 612.
Westphall vs. Ludlow, 2 McCrary Cir. Ct., 505.
Kiser vs. Ruddick, 8 Blackf. (Ind.), 382.
Mills vs. Gould, 14 Ind., 278.
Clark vs. Young, 1 Cranch 181.
Jones on Pledges, § 702.

And in a case where the question of bar of the Statute of Limitations was set up by a pledgee, as against a claim of this kind by a pledgor against him for damages in not collecting a judgment, it was held that the

mere accruing of an item of possible damages as the expiration of the lien of a judgment on debtor's land, was not the beginning of the cause of action for negligence from which the statute began to run; for, *non constat* but that the value of the judgment could still have been collected. And it was held that the cause of action arose only when the claim, through non-prosecution, became substantially lost, as when the debtor sold his land, pocketed the money, and died insolvent.

Hanna vs. Holton, (70 *a* and *b*), 78 Pa. St., 334.

See, for full opinion of the Court in this case on this point, Part One, Point *supra*.

2D.

The defenses arising out of the neglect to sell and prosecute the collatterals are in the nature of cross claims of recoupment, set-off and counterclaim, and not true defenses.

Some states still hold that a separate action must be brought on such a claim, and that it is not a defense to the original debt.

Fletcher vs. Harmon (Maine, 1886), 7 Atlantic Rep., 271.

It is the settled rule that a counterclaim, set-off or recoupment may be interposed by a defendant; *but he is not bound to do so.*

Freeman on Judgments, S. 277.

A judgment does not bar a set-off which was not interposed.

Freeman on Judgments, § 277.
Brown vs. Gallaudet, 80 N. Y., 413, 417.

Thus, a judgment against A for the value of property which he agreed to give B in exchange for a chattel he received from B, but which he refused to deliver, is not a bar to a subsequent action brought by A for damages for breach of warranty as to the chattel received by him ; if the question of warranty was not raised by the pleadings and the controversy in the former suit.

Morgan vs. Powers, 66 Barb., 35.

When a creditor has agreed to dispose of collateral stock held in pledge and apply the proceeds to the payment of the debt, his neglect to do so is not a bar to an action upon the debt, but is a matter of recoupment or set-off.

Taggard vs. Curtemus, 15 Wend., 155, 158.

A creditor holding collateral securities may enforce the principal debt without surrendering the securities.

Jones on Pledges, S. 681, 685.
Lewis vs. United States, 92 U. S., 618.

In fact the old law was :

" That all instances wherein a party was injured, either by a partial failure of the consideration of the contract or of fulfillment of the contract, or of a warranty, the person so injured could not defend himself in an action on the contract by proving these facts, but could find redress only in a cross-action against the plaintiff."

Withers vs. Greene, 9 Howard, 213, 227.

Under the present law the defendant may, if he elects, set off such claims.

Ibid.
Van Buren vs. Digges, 11 How. U. S., 461.
Florida R. R. Co. vs. Smith, 21 Wall., 255.

There has been of late years considerable relaxation in the old rule, and set-offs, or recoupments, are now allowed at law in the United States Courts.

Thus, in an action for goods sold and delivered, a set-off, or recoupment, for damages resulting from breach of a warranty, is allowable.

Dushane vs. Benedict, 120 U. S., 630.

And conversion or non-application of the proceeds of collaterals to the payment of a note is a defense at law to the maker, as against the payee or indorsees obtaining title, with notice of the facts (Cotton Factor and Plantation case).

Allen vs. St. Louis Bank, 120 U. S., 20, 21.

3D.

THE JUDGMENT OBTAINED ON THE PRINCIPAL DEBT DOES NOT MERGE THE COLLATERALS. It is a mere change in the evidence of the obligation, and the collaterals remain as before—collateral to the original debt as so represented.

Fisher vs. Fisher, 98 Mass., 303, 304.
Jenk vs. International Bank, etc., 111 Ill., 462, 471, 472.
Jones on Pledges, S. 591.
Smith vs. Strout, 63 Me., 205.
Lewis vs. United States, 92 U. S., 618.
Jones vs. Scott, 10 Kans., 33.
Charles vs. Coker, 2 So. Ca., 122.
Sonoma Valley Bank vs. Hill, 59 Cal., 107.

Where one partner had joined an outsider in making a note to a creditor of the firm as collateral security to

a firm debt, held, a judgment on the collateral note did not merge equities and set-offs arising on the original agreement.

Hawks vs. Hinchcliffe, 17 Barb., 492.

4TH.

THE JUDGMENT OBTAINED IS NO BAR TO A SUIT FOR VALUE OF COLLATERAL CONVERTED.

Where notes had been given as collateral security to a debt under an agreement that they should become the property of the pledgee if the debt was not paid within ten days after maturity, and the pledgee sued on the debt, but pending suit sold the collateral notes, and then obtained judgment on the principal debt; and the pledgor, having paid the judgment, sued the pledgee to recover the amounts paid on the collateral notes, it was held, that the agreement forfeiting the equity was not binding, and the plaintiff was entitled to recover. Thus substantially holding that the judgment was not a merger.

Dorrill vs. Eaton, 35 Mich., 302.

Where a judgment was obtained in Minnesota and the defendant therein had at the time an independent counterclaim which he might then have pleaded as a counterclaim, held, that he was not bound then to plead it, and that he might set it up as a defense to an action on the judgment brought against him in Iowa.

Folsom vs. Winch, 63 Iowa, 477.

Again, where a counterclaim had been interposed in

a suit in Indiana, but was subsequently dismissed for want of prosecution, and the plaintiff had judgment, and thereafter brought suit on the judgment in Kentucky, the defendant was allowed to set up and litigate such counterclaim.

Rankin vs. Barnes, 5 Bush. (Ky.), 20.

The defense of recoupment, set-off or counterclaim for loss of pledged property is an independent cross-claim, constituting a cause of action by itself; and, therefore, under the general rule in those States, where it is allowed, may be interposed or not to a suit on the debt just as the pledgee sees fit.

Stearns vs. Marsh, 4 Denio, 227.
Jones on Pledges, S. 595.
Cass vs. Higenbotam, 100 N. Y., 248.
s. c. below, 27 Hun, 406.
Donnell vs. Wyckoff, 49 N. J. Law, 48.

5TH.

THE RECEIVER TAKES THE NOTES AND THE JUDGMENT SUBJECT TO ALL THE EQUITIES EXISTING IN FAVOR OF THE DEFENDANT.

Beach on Receivers, S. 699.
Second National Bank vs. N. Y. Silk Manfg. Co. (3d Circ., N. J., 1882), 11 Fed. Rep., 532.

A Receiver cannot claim securities in the hands of a creditor until the debt is satisfied.

Benedict vs. Maynard, 5 McLean, 262.

In a suit by a Receiver of a bank against a pledgor who had pledged securities with the president of the bank as collateral security to the debt and the president had converted them :

Held that the defendant had a right to counterclaim the value of the securities so converted as against the Receiver.

Cutting vs. Marlor, 78 N. Y., 454.

This case was cited with approval in

Preston vs. Prathes, 137 U. S., 604, 614.

So in another case an amount due from the corporation to the defendant for services as attorney was allowed to be counterclaimed as against debt sued upon by Receiver.

Davis vs. Stover, 58 N. Y., 473.
s. p., Cork vs. Cole, 55 Iowa, 70.
See Glucker & Becker on Receivers, 397 and note.

The same rule is well established as to assignees in insolvency and bankruptcy.

Yeatman vs. The New Orleans Savings Institution, 95 U. S., 476.
Jones on Pledges, S. 585, S. 586.
In re Wiley, 4 Biss., 171.
Gibson vs. Warden, 14 Wall., 244.

The amount due on a fire policy of a fire insurance company issued to a banker, who is also one of the directors, may be set off against a demand of the company for money deposited with him on call; and the

right to such set-off is available against its assignee in bankruptcy.

Scanmon vs. Kimball, 92 U. S., 362.
See Balbach vs. Frelinghuysen (3d Circ., N. J., 1883), 6 N. J. Law Journal, 105.

In an action by an assignee for the benefit of creditors suing on the contract or a *quantum meruit* for partial performance of a contract originally made with his assignor, the defendants may counterclaim damages arising out of the default and non-performance of the contract.

Patton vs. Royal B. P. Co., 114 N. Y., 1.

6TH.

IT WAS THE RECEIVER'S DUTY TO CARRY OUT THE CONTRACT OF THE TRUST COMPANY AS TO THESE COLLATERALS IF HE ELECTED TO ACCEPT THE NOTES AND THE JUDGMENT ON THEM; and the same recoupment exists against him as against the trust company. He took the benefit saddled with the burden. Defendant can hold him in damages for his failure to sue and collect.

A.

It is no defense that he was a New Jersey Receiver and the defendants were out of the State of his appointment.

A Receiver, appointed by the U. S. Circuit Court for the Southern District of Ohio, of a railroad company may sue in the Superior Court of Cincinnati, upon a contract made by the railroad company, in the corpo-

rate name of the company, without disclosing in the petition his own name as Receiver.

Ohio & Miss. R. R. Co. vs. Indianapolis & Cin. Co., 5 Am. Law Reg. (N. S.), 733, 744, cited in 1 Redf. on Railways, 649.

The Receiver could have brought suit here on collaterals in the name of the corporation or in name of McGregor, the director, who held the legal title.

Where a corporation became insolvent and a Receiver was appointed in Connecticut, and thereafter the corporation brought suit on a note which was a part of the assets accruing under the Connecticut decree to the Receiver, and objection was made on that ground, the Court held:

Plaintiff was entitled to sue. The Receiver, being an officer of the Connecticut Court, could not sue in his own name in our Court.

Hope Mutual Life Ins. Co. vs. Taylor, 2 Robertson, 278.

B.

Mere insolvency, suspension and appointment of Receiver does not work a dissolution of the corporation; it is not dissolved until a judgment of dissolution.

Bradt vs. Benedict, 17 N. Y., 93.
Kincaid vs. Divinelle, 59 N. Y., 548.
Willink vs. Morris Canal Co., 3 Gr. Ch., 378.

C.

He cannot defend on the ground he had no notice of the contract, etc. Culver offered to prove notice to him

and requests on him as Receiver to prosecute (Rec., p. 42, fol. 85).

7TH.

The trust company and the Receiver were bound to carry out their contract to prosecute claims, although the expense would exceed the value of the property transferred to them.

"A person who, upon receiving an assignment of a share of property as security for a debt agrees to comply with the contract of the assignor with a third party, a joint owner of property, is bound to fulfill that contract, although it exceed in amount the value of the share of the property transferred to him."

Clarke's Executors vs. Carrington, 7 Cranch, 308.

8TH.

The cross-claims in question are legal causes of action (see cases cited under Point *supra*).

They are available at law in the United States Courts.

"Defendants in the Circuit Courts of the United States can avail themselves of the laws which prevail in the State concerning the right of set-off generally."

Partridge vs. The Insurance Co., 15 Wall. 573, 580.

This is not an equitable recoupment; it is one allowed in actions at law in the State of New York, where this action is brought.

Stearns vs. Marsh, 4 Denio.
Cass vs. Higenbotam, 100 N. Y., 248.

It is also a defense allowed at law in an action in New Jersey.

Donnell vs. Wyckoff, 49 N. J. Law, 48.

In the United States Courts a set-off may be pleaded which would be good in the Courts of the State where the United States Court sits.

Frick vs. Clements (Circ. Ct., S. D., Ga., 1887), 31 Fed. Rep., 542.

9TH.

When the judgment was obtained by the Receiver upon the original debt, he held the collaterals as collaterals to the debt, as evidenced in the new form.

He cannot enforce the debt without accounting for the collaterals.

His rights on the judgment and in regard to the collaterals are no greater than would be those of the company had it obtained the judgment.

Had the company obtained the judgment a defense of set-off could be made against them arising out of the loss of the collaterals.

Since the New Jersey law allows this set-off to be made in the action on the principal debt, when we allow this set-off to be made in the suit in New York we allow the judgment the same "force and effect" as in the State where rendered.

Public Works vs. Columbia College, 17 Wall., 521.

Again set-off and the law of set-off is entirely a matter of the law of the forum, and the set-off, being allow-

able in New York and in the United States Court sitting there, is valid.

"The law of set-off and the law of tender belong rather to the remedy than the substance, and, therefore, are always regulated by the law of the State in which the action is brought and not by that in which the note sued on is made."

2 Pars. on Notes & Bills, 375.
Davis vs. Morton, 5 Bush. (Ky.), 160.

For the reasons stated above the judgment should be reversed with costs.

R. Floyd Clarke,
For Plaintiff in Error.

APPENDIX A.

SUMMARY ABSTRACT OF CASES IN THE COURTS OF THIS COUNTRY WHEREIN WAS DRAWN IN QUESTION THE ADMISSIBILITY OF ORAL EVIDENCE TO ALTER, VARY, CONTRADICT OR ADD TO A WRITING, COMPILED FROM THE UNITED STATES DIGEST AND ITS ANNUAL CONTINUATIONS TO DATE.

(NOTE. Cases cited and discussed in the Brief are omitted herein as a rule.)

Subdivision I.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE IT IS CLAIMED THAT THE CONTRACT WAS DELIVERED TO TAKE EFFECT ON A CONDITION.

Oral stipulation that contract to become binding only on assent of surety, held admissible. *Wilson vs. Powers*, 131 Mass., 539.

Conditional delivery of document may be proved by parol. *McFarland vs. Sikes* (Conn.), 7 A., 408.

Condition on which contract is to take effect may be proved by parol. *Wendlinger vs. Smith*, 75 Va., 309.

Ottawa & C. R. R. Co. vs. Hall, 1 Ill. App., 612. Subscription paper.

Oral evidence as to a condition on which the instrument is to take effect valid. *Michels vs. Olmstead*, 14 Fed Rep., 219.

Oral evidence that an instrument is only intended to be operative on the happening of a future event is valid. *Wastman vs. Knowsville*, 30 Minn., 313; *Reynolds vs. Robinson*, 110 N. Y., 654; *Jaillard vs. Chaffee*, 92 N. Y., 535.

Subdivision II.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE WRITING DOES NOT EMBODY THE ENTIRE CONTRACT AND AN ORAL COLLATERAL AGREEMENT IS ALLEGED.

Evidence of an oral promise collateral to a sale of a business that the vendor shall not transact business in the vicinity.

Admissible.

Oral evidence collateral to sale of business not to transact business in neighborhood. Competent. (1828) *Pierce vs. Woodward*, 6 Pick., 216.

Welz vs. Rhodius, 87 Ind., 1. Lease of hotel, oral promise of lessor not to engage in business in city.

Fusting vs. Sullivan, 41 Md., 162. Sale of house at C. Oral covenant not to do business, etc.

Not admissible.

Oral stipulation collateral to sale of business. Vendor not to do business in the neighborhood. (1850) *Wilson vs. Sherburne*, 6 Cush., 68.

Subdivision II.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE WRITING DOES NOT EMBODY THE ENTIRE CONTRACT AND AN ORAL COLLATERAL AGREEMENT IS ALLEGED.

Not admissible.

Doyle vs. Dixon, 12 Allen, 576. Oral promise not to do business within five years.

Written lease. Held, oral evidence that lessor should not engage in business on same block not competent. *Scholz vs. Dankert*, 69 Wisc., 416.

Oral warranty admissible.

Briggs vs. Hilton, 99 N. Y., 526. Part of contract only in writing.

Lytle vs. Bass, 7 Coldw. (Tenn.), 303. Suit on note—breach in warranty on sale of mill for which note given.

Smith vs. Coleman, 77 Wisc., 343. Lease of engine—oral that it would do work required.

Redwing Manufacturing Co. vs. Mol, 62 Wisc., 240. Bill of sale—oral warranty admissible.

Collet vs. Ward, 68 Wisc., 420. Same point.

Oral warranty not admissible. Harmer vs. Groves, 15 C. B. 667; *Keller vs. Webb*, 126 Mass., 393; *Johnson vs. Powers*, 65 Cal., 179.

Buchtel vs. Mason Lumber Co., 1 Flipp C. Ct., 640. Of amount of timber to be cut.

Eighmie vs. Taylor, 98 N. Y., 288. Of amount of oil to be pumped.

De Witt vs. Berry, 134 U. S. 306. To add warranty.

Etheridge vs. Palin, 72 N. C., 213.

Mayer vs. Dean, 54 N. Y. Super. Ct., 315. Writing called for "81 bags of mustard seed like sample"—oral that it should be free from dirt incompetent.

Graham vs. Eidzinger, 28 Ill. App., 269.

Williams vs. Aylesworth, 7 N. Y. Supp., 111. "I guaranty collection of within note." Oral evidence of verbal warranty that the note was good and would be paid at maturity incompetent.

Thompson vs. Libby, 34 Minn., 374. Contract of sale—oral warranty inadmissible.

Written contract no warranty—oral warranty cannot be shown. *Mast vs. Pearce*, 58 Iowa, 579.

Compare *Hauger vs. Ecius*, 38 Ark., 334.

MISCELLANEOUS CASES.

Admissible:

Oral evidence admitted to show absolute transfer of stock made as collateral. *Reeve vs. Dennett*, 137 Mass., 315.

Oral evidence is admissible of oral contract, the performance of which is secured by a chattel mortgage, although not set up in mortgage. *Reynolds vs. Hassam*, 56 N. C., 449.

Oral evidence mortgagor might sell as though no mortgage. Admissible. *Perry vs. Doe*, 56 Vt.

Absolute conveyance in mutual contract—oral to show collateral proper. *Marsh vs. McNair*, 99 N. Y., 174.

Where writing is in part performance of verbal contract, the rule has no application. *Burks vs. Gillett*, 13 Ill. App., 369.

Purchase of sight drafts, oral agreement that if vendee did not

Subdivision II.

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Admissible.

buy cattle, he might return and get interest on deposit. Competent. *Collingwood vs. Merchants' Bank*, 15 Neb., 118.

Instrument acknowledging receipt of collaterals and specifying notes—may show other notes. *Hill vs. Durand*, 58 Wisc., 160.

Compare *Gilchrist vs. Brande, Id.*, 184.

Independent oral contract can be proved. *Oregonian Ry. Co. vs. Wright*, 10 Or., 162.

Absolute bill of sale may be shown to be collateral security. *Vidvie vs. Diehl*, 62 Iowa, 676.

Bill of sale of goods. Oral evidence to show how proceeds to be applied competent. *Ewaldt vs. Fiedler*, 62 Iowa, 212.

See receipt in full and releasing defendant from contract "as to hauling stone" for specified sum. Plaintiff may show he was to get additional amount out of sale of stone. *Cornell vs. Vanderveerken*, 1 Mackey (D. C.), 242.

A deposit ticket signed by depositor and given to bank is a mere memorandum, and oral evidence is admissible of the whole contract. *Weisinger vs. Gallatin Bank*, 10 Lea (Tenn.), 330.

Writing not whole agreement evidence of verbal portion competent. *Smith vs. O'Donnell*, 8 Lea (Tenn.), 468.

Dispute as to payment of mortgage note, the payee made a new one for claimed balance, on agreement that if the first had been paid in full the new note was to be delivered up. Held, oral evidence of this competent. *Smith vs. Baragf*, 75 Ind., 412.

Plaintiffs signed an order for goods stating price and terms. Held, competent to show defendant promised to advertise goods. *Ager vs. R. W. Bell Mfg. Co.* (Mass.), 16 N. E., 754.

Action on written contract giving credit. Proof defendant should not be bound, unless they had satisfactory report on plaintiffs' solvency competent. *Reynolds vs. Robinson* (N. Y.), 18 N. E., 127; 110 N. Y., 654.

Assignment of tract of land and also bond and mortgage. "All such property to be subject to any decree that might be rendered in pending suit against assignor. Assignor assigned equity to third party. Assignee compromised decree and got money on bond and mortgage. Second assignee sued.

Held, competent to prove assignment of bond and mortgage only to indemnify against loss, if any, on land purchased by first assignee. *Fullwood vs. Blanding* (S. C.), 2 S. E., 565.

Oral evidence of express notification by lessor to lessee against certain uses of premises where lease silent is admissible. *New Orleans R. R. Co. vs. Darius* (La.), 2 So., 230.

Oral evidence that time mentioned in contract was agreed to be of essence admissible. *Van Winkle vs. Wilkins* (Ga.), 7 S. E., 644.

In an action for breach of covenant against incumbrances oral evidence is admissible that when the deed was given plaintiff agreed to pay assessment then on the land. *Sinnavich vs. Wood*, 145 Mass., 180.

Oral evidence admissible if part only of contract put in writing. *Brown vs. Bowen*, 90 Mo., 184.

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Admissible.

Owner of land authorized agent to sell for $1,600. Held competent to show part might stand on mortgage. *Magill vs. Stoddard*, 70 Wisc., 75.

Oral evidence of agreement to lay a floor competent though written lease. See *Pierce vs. Pierce*, 143 Mass., 386.

An oral option that if building burned the lessee might rebuild and have insurance money competent. *Cumming vs. Barber*, 99 N. C., 332.

Absolute assignment of particular payment in mortgage with note. Assignor may prove it was made as security for loan. *Hyler vs. Nolan*, 45 Mich., 357.

Oral evidence that note was assigned as collateral, and not absolutely admissible. *Wood vs. Matthews*, 73 Mo., 477.

In equity it may be shown that absolute instrument was executed as a mere security. *Booth vs. Robinson*, 55 Md., 419.

Certificate of stock assigned by assignment absolute on face. Oral that it was assigned as collateral security competent. *Burgess vs. Seligman*, 107 U. S., 20.

Greenawalt vs. Kohne, 85 Pa. St., 369. Vendor's oral agreement to take back property and pay for improvements if purchaser did not like it.

Peabody vs. Bement (Mich.), 44 N. W., 416. Written contract for publication. Evidence of whole competent. Oral stipulation. Defendants to be exclusive advertisers in that trade.

Biggs vs. Groces, 9 N. Y. Supp., 765. Plaintiff to receive half net profits. Evidence, stock to be called $5,000 and profits on that valuation

Snow vs. Alley, 23 N. E., 576. Distinct oral agreement competent as to what was to be done with bonds.

Isaac vs. Jacobs, 8 N. Y. Supp., 344. Oral agreement that a note was payable only out of proceeds of claim assigned, in consideration of which it is given. Competent.

Boynton Furnace Co. vs. Clark, 42 Minn., 335. Part of warranty in writing. Balance competent.

Haagus vs. Hellemeier, 120 N. Y., 651. Building contract according to specifications annexed. None were annexed or signed. Oral evidence as to the terms of the specifications agreed on. Competent.

Barney vs. Forbes, 118 N. Y., 580. Two letters enclosed in same envelope and sent to plaintiff containing a guaranty under Statute of Frauds. Oral evidence to connect and show consideration in writing competent.

Holly vs. Blackman (So. Ca.), 10 S. E., 774. Note given for horse. Oral as to terms of sale. Competent.

Rash vs. Barlow, 6 Mack., 245. Lease with covenant to sell at option of tenant. Oral that if lessee assigned right to purchase he would pay lessor half of sum received. Competent.

Dana vs. Taylor (Mass.), 22 N. E., 65. Written agreement for nonsuit on agreed default in land suit does not exclude evidence that defendant paid costs on agreement that if he did so no new suit would be brought.

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Admissible.

VanderKarr vs. Thompson, 19 Mich., 82. Oral reservation of crops in contract of sale.

Lytle vs. Bass, 7 Coldw. (Tenn.), 303. Suit on note, proof of breach of warranty on sale of mill, for which note given.

Buzzell vs. Wizard, 44 Vt., 44. Collateral agreement as to property conveyed.

Weaver vs. Fletcher, 27 Ark., 510. Collateral agreement.

Perry vs. Hill, 68 N. C., 417. Entire verbal agreement, note given as part.

Letcher vs. Letcher, 50 Mo., 137. Oral part erased from written contract.

Allen vs. Sowerby, 37 Md., 410; *Purcell vs. Burns*, 39 Conn., 429. Quitclaim deed, suit to enforce oral agreement, whole contract allowed.

McDill vs. Gunn, 43 Ind., 315. Oral to show purchaser under deed took subject to encumbrance and agreed to pay.

Cassidy vs. Regsden, 38 N. Y. Super., 180. Verbal contract bill of sale—mere memorandum—the whole admissible.

Wilson vs. Tucker, 10 R. I., 578. Notes having been endorsed referring to a contract, oral evidence to identify the contract competent.

Sharkey vs. Miller, 69 Ill., 560. Contract to build elevator and put in heater. Price of last omitted. Subsequent conversation fixing this competent.

Knox vs. Clifford, 38 Wisc., 651. Note not to be negotiated by payee.

Weeks vs. Medler, 20 Kansas, 57. Note given for sewing machine. Oral contract, vendor agreed to furnish work for certain time at agreed price, competent.

Phelps vs. Whitaker, 37 Mich. Written order for windmill. Oral as to circular and statements of agent.

S. P. Richards vs. Fuller, 37 Mich., 161.

Greenwalt vs. Kohne, 85 Pa. St., 369. Vendors agreement to take back property and pay for improvements made, if purchaser did not like it.

Thomas vs. Hammond, 47 Tex., 42. Agreement to apply payments on purchase money notes to pay off liens on land.

Havana R. R. Co. vs. Walsh, 85 Ill., 58. Sale of ties: oral contract: ties to be inspected before loaded.

Wickenkamp vs. Wickenkamp, 77 Ill., 92. Note given for balance to date does not bar. Evidence of oral contract as to services under which subsequent services rendered.

Wade vs. Carter, 76 N. C., 171. Admissible to show circumstances of assignment of judgment.

Chase vs. Senn, 13 N. Y. Supp., 266. Written agreement oral: that advertisement should be put in cars on one of several routes: competent.

Arms vs. Arms, 113 N. Y., 646. Evidence as to agreement leading up to note competent.

Burnham vs. Dorn, 72 Me., 198. Warranty deed grantee orally agreed to pay off mortgage as part consideration.

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Admissible.

Bradshaw ex. Combs, 102 Ill., 428. Oral evidence of promise note to be extended one year in consideration of endorsement that interest at 10% to be paid.

Lamphire ex. Crawford, 76 N. Y., 97. Written, but unsigned collateral agreement. *Brown ex. Decker*, 21 Hun, 199.

Fant ex. Spragg, 50 Md., 551. Collateral agreement with surety as to application of collateral to pay debt.

Whitney ex. Shippen, 89 Pa. St., 22. Oral as to removal of fixtures by assignee of lease made with lessor and lessee.

Moreney ex. Quarles, 1 McLean, 194. Agreement to compromise suit silent as to costs; oral agreement whom to pay competent.

Bassher ex. Forbes, 36 Md., 154. Agreement of third party with corporation not to hold stockholders liable for non-performance of written contract made with corporation admissible as a collateral agreement.

Beason ex. Peebles, 5 Mo. R., 132. Admissible to show time; place and manner of performance of contract silent as to these points.

Bonney ex. Morrill, 57 Me., 368. Other collateral contract not inconsistent.

Solenberger ex. Gilbert's Adm. (Va.), 11 S. E., 789. Endorses oral agreement as to use of note competent.

Miller's Natl. Ins. Co. ex. Kinnicard, 35 Ill. App., 105. Adjuster and insurance agent entered into written agreement as to amounts of loss on parts of mills, etc., "without reference to any other questions or matters of difference within the terms and conditions of the policy." Held, oral proof of adjuster's promise his company would pay a certain sum as their share of loss, competent.

Barclay ex. Hopkins, 59 Ga., 562.

Fire Ins. Co. ex. Wickham, Lawyers' Co-op. U. S. Rep., 860.

Warner ex. Landis, 137 Pa., 61.

Hess ex. Board of Education, 33 Ill. App., 440.

Van Brunt ex. Day, 81 N. Y., 251, 254. Defendant assigned bond and mortgage with guaranty of payment on suit. Upon this guaranty he was allowed to prove oral contract by assignee for consideration to keep property insured against loss, neglect to insure and loss.

Chapin ex. Dobson, 78 N. Y., 74. See 110 N. Y., 49. Oral evidence of contract that machines sold should do defendant's work satisfactorily or be taken back.

Routledge ex. Worthington Co., 119 N. Y., 597.

Ferguson ex. Baker, 116 N. Y., 261.

Barker ex. Bradley, 42 N. Y., 316, 319.

Union Trust Co. ex. Whiton, 97 N. Y., 172.

Nilson ex. Morse, 52 Wisc., 240. Contract to pull stumps. Landowner allowed to prove wheat in ground at time to show intention. Stumps not to be pulled after first frost, but later.

Not admissible:

Fay ex. Gray, 124 Mass., 500. Receipt stating certificate of stock held as collateral with agreement that the pledgee might sell on one day's notice. Oral evidence of contract that pledgee might use the certificate, incompetent.

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EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE WRITING DOES NOT EMBODY THE ENTIRE CONTRACT AND AN ORAL COLLATERAL AGREEMENT IS ALLEGED.

Not admissible.

Bonham ex. Craig, 80 N. C., 224. In absence of fraud oral evidence that at time of delivery of deed grantee agreed to reconvey, inadmissible.

Engelhorn ex. Reitlinger, 122 N. Y., 76. Where written contract appears to be complete oral evidence is incompetent. Thus, where on a sale of quinine, the writing was full and complete, it was held that oral evidence that the vendors agreed that, if purchasers would execute the contract, the vendors would raise the price of quinine from fifty-nine to sixty-one cents, was inadmissible.

Seitz ex. Brewers' Machine Co., 35 Lawyers' Co-op. U. S. Rep., 837. Sale of ice machine—oral warranty capable of cooling certain space.

Contra. Chapin ex. Dobson, 78 N. Y., 74.

Spawden ex. Guion, 101 N. Y., 462. "By a sea" cannot be limited to cattle on deck.

Eighmie ex. Taylor, 98 N. Y., 288. Formal contracts, oral as to amount of oil to be pumped.

Couch ex. Woodruff, 63 Ala., 466. Oral, that one partner agreed to increase his obligations under articles.

Crelton ex. Vineland Wine Co., 33 N. J. Eq., 466. Bond and mortgage and bill of sale, oral, to vary; and bill of sale, oral, to vary.

Cocke ex. Blackburn, 58 Miss., 537. *Porter ex. Sandige*, 32 La. Am., 449. Oral that debtor to pay debt of third party also out of proceeds of life policy taken out for creditor's benefit.

Stevens ex. Haskell. Lease of mill, collateral agreement about sawing lumber.

Brown ex. Wing, 20 How., 442, 448. Oral evidence to prove payee not to present bill of exchange for acceptance till another draft paid.

Eberle ex. Girard Life Ins. Co. (Pa.), 4 Atl. Rep., 808. Lease oral covenant to repair roof.

Not admissible. *Helmrichs ex. Gehrke*, 56 Mo., 79. Oral to supplement a written agreement to release a claim, with stipulation that notes were to be returned and canceled.

Dicus ex. Johnson, 117 Ind., 512. Lease, full; oral evidence lessors to drain land.

Kesler ex. Smith, 42 Minn., 794. Cannot be shown against written order by buyer and acceptance by seller that there was an oral agreement that the buyer might countermand.

Not admissible. *Munroe ex. Behrens*, 67 Pa. St., 459. Written lease: defendant sued for rent tried to prove oral contract if house burned, rent to cease.

Not admissible. *Read ex. Bank of Attica*, 124 N. Y., 671. Certificate of deposit—oral to prove agreement to pay interest.

James T. Hair Co. ex. Walmsley, 32 Mo. App., 115. Written contract for advertisement—oral contract defendant to be the only advertiser in red ink card is incompetent. See *Bassett ex. Glover*, 31 Mo. App., 150.

Neuman ex. Dreifurst, 9 Colo., 228. No provision for lien in the writing—oral that lien intended to be secured; incompetent.

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Not admissible.

Harvey vs. Million, 67 Ind., 465. Warranty deed—oral reservation of growing crop.

Where the instrument, in addition to the acknowledgment of payment or delivery, contains an agreement to do anything in respect to the property delivered: as to latter it cannot be changed orally. *Thompson vs. Williams*, 30 Kans., 114.

Oral evidence inadmissible to show deed in fee not to operate or that the grantee agreed to re-convey on request without consideration. *Hutchins vs. Hutchins*, 98 N. Y., 56.

Written lease, oral evidence of warranty as to capacity of boiler, etc., incompetent. *Naumberg vs. Young*, 44 N. J. L., 331.

Oral agreement collateral to written contract of sale that vendor agreed to use influence to get business for vendee and to sell to him in future. Held incompetent. *Belcher vs. Mulhill*, 57 Tex., 17.

That a promissory note is only payable out of commissions to be earned by maker as agent of payee is incompetent. *Van Vechten vs. Smith*, 59 Iowa, 173.

Written contract of sale (not stated to be by sample) cannot prove orally it was by sample. *Weiner vs. Whipple*, 53 Wis., 298.

Written lease silent. Oral evidence that the lessor agreed to pay water rates incompetent. *Williams vs. Kent*, 67 Md., 350. ALVEY, J., dissents.

Action on written contract. Oral evidence as to particular mode of testing machinery incompetent. *Exhaust Ventilator Co. vs. Chicago, Milwaukee & Roy. Co.*, 69 Wisc., 454.

Endorsement on note. Evidence to vary effect incompetent. *Kuo Linch vs. Crossman* (Minn.), 37 N. W., 586.

Oral agreement between payee and irregular endorser that the latter was not to be liable incompetent. *Thomson vs. McKee* (Dak.), 37 N. W., 367.

Written promise to pay a specified sum on completion of a railroad. Not to be varied by proof of connection with other railroad, but may prove *termini*. *Law vs. Studenbaker* (Ind.), 10 N. E., 301.

Deed absolute in form. Oral to show grantee took in trust for grantor incompetent. *Lawson vs. Lawson*, 117 Ill., 98.

Written lease. Oral evidence of lessor's promise to put in switch-track inadmissible. *Tracy vs. Union Iron Works*, 29 Mo. App., 342.

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Admissible.

Land conveyed to "an association of persons." Evidence as to who were the grantees competent. *Pratt vs. Cal. Mining Co.*, 24 Fed. Rep., 869.

Order "paid out of last payment." Oral proper to show which payment meant. *Proctor vs. Hartigan.*

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EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE CONTRACT IS AMBIGUOUS.

Admissible.

"$2 per 1,000 feet." Where two ways of sawing lumber, oral to show which competent. *Smith vs. Aikin*, 75 Ala., 209.

"Hewn timber to average 120 feet to class B No. 1 good." Oral to show square and not spar timber intended competent. *Jones vs. Anderson*, 76 Ala., 427.

Written contract of sale of logs not seen by purchaser. No mention of size. Oral as to representations of vendor as to size competent. *Lieske vs. Methudy*, 14 Mo. App., 85.

"Dollars." Kind can be shown. *Taylor vs. Bland*, 60 Tex., 29.

"In trust for Sarah." Oral evidence to identify *cestui que trust* competent. *Bartlett vs. Remington*, 59 N. H., 364.

One express company gave to shipper printed receipt of another company, inserting its name in heading, but omitting to change name in the limiting liability clause. Held, that clause ambiguous, in law the contract of neither company, but it may be shown to be the contract of the company giving the receipt. *Adams Express Co. vs. Roskowitz*, 107 Ill., 660.

"To be paid as soon as we settle with company." Oral to show meaning competent. *DesMoines Co. vs. Hinkley*, 62 Iowa, 637.

"Hard-burned red brick." Oral competent to show whether "full-faced" or concave contracted for. *Moore vs. U. S.*, 17 Ct. of Cl., 17.

"If required." *Fenton vs. U. S.*, 17 Ct. of Cl., 138.

Oral evidence to show matter included in judgment and award competent. *Carter vs. Shilles*, 74 Main., 273.

Hall and Long sued on bond to Hull and Long. Oral evidence admissible to show bond same given by order of Chancellor on bill by Hall & Long. *Thompson vs. Hall*, 67 Ga., 627.

Question whether State grant was made to Ferrell or Terrell. Grantee Ferrell in grant. Terrell in plat. Held, patent ambiguity. Oral evidence to show Ferrell was the man was competent. *Ferrell vs. Hurst*, 68 Ga., 132.

Stone at so much "per perch." Evidence as to how parties estimated number of feet therein competent. 38 Ohio St., 587.

Oral evidence competent to explain ambiguous vote of town as to payment being made for injuries solely or in full of all demands. *Matthew vs. Westborough*, 134 Mass., 555.

Price per acre allowed. *Deakins vs. Allen*, 9 Lea (Tenn.), 494.

Land to J. S.: there were two—father and son; oral evidence of which competent. *Simpson vs. Dix*, 131 Mass., 179.

"On margin:" evidence admissible of meaning of term. *Hatch vs. Douglass*, 48 Conn., 116.

If contract is obscure oral evidence is competent. *Kinck vs. Kinck*, 75 Va., 12.

"Douglas Gold Mine" in deed; oral evidence competent to identify. *Ransom vs. George*, 65 Ala., 258.

Mortgagee described as president; doubtful whether corporation or individual intended; oral evidence admissible in equity to show which. *Chambers vs. Falkner*, 65 Ala., 448.

Doubtful endorsement. Held oral evidence competent to explain. *Husk vs. Broussard*, 55 Tex., 201.

Terms of contract susceptible of two constructions; oral evidence of negotiation competent. *Mason vs. Ryus*, 26 Kans., 464.

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Admissible.

Subscription note binding on completion of road. Held, evidence of papers and statements as to termini proper. *Lawrence vs. Smith*, 57 Iowa, 701.

Where writing is ambiguous as to whether it is a sale or bailment extrinsic evidence is competent. *Lyon vs. Lemon*, 106 Ind., 567.

Plaintiff had contract "to push said driving (of piles) was to keep out of the way of the track layers 'and' to drive on said line until all of the piles were driven" to terminus of road. Held, on question whether plaintiff had exclusive right, oral evidence admissible of others doing work without objection, and of his accepting assistance from others without objection. *Thompson vs. Locke*, 65 Iowa, 429.

Written contract leaving it doubtful whether party bound as principal or agent only, oral evidence admissible. *Hartzell vs. Crumb* (Mo.), 3 S. W., 59.

Defendant signed bill of exchange as "Treasurer:" suit against him. Held, competent to prove true intent whereon falls doubt as to party bound. *Martin vs. Smith* (Miss.), 3 So., 33.

Where support for life is secured by conditional deed or mortgage, but language as to place of support is ambiguous, oral evidence is admissible to show intent of parties. *Young vs. Young* (Vt.), 10 A., 528.

Acceptance of order from contractor by owner "to be paid out of the last payment." Evidence that parties intended last payment in contract, and, if contractor did not fulfill, so that last payment did not become due, defendant not to be liable. Competent. *Proctor vs. Hartgan* (Mass.), 9 N. E., 841: 143 Mass., 462.

Contract for sale of chemicals "at ruling market rates." Evidence showed two rates, one importers', other jobbers': evidence as to which meant admissible. *Manchester Paper Co. vs. Moore* (N. Y.), 10 N. E., 861.

"Finished and ready for setting:" meaning may be shown. *Myers vs. Tibbals* (Cal.), 13 P., 695.

Parol admissible to explain patent ambiguity. *Hill vs. John P. King Mfg. Co.* (Ga.), 3 S. E., 445.

Note and mortgage put into judgment silent as to original payee; oral evidence that they were made to one not judgment plaintiff. Held, proper. *Johnson vs. Pennell*, 67 Iowa, 669.

B, furnishing lumber to A to build house for C, refused to do so any more. A gave order on C. C accepted: "It is understood that the dwelling shall be completed before this draft is paid." A failed to complete house. B sued C. Held, oral evidence competent, the meaning and circumstances. B nonsuited. *Ferguson vs. Davis* (Mich.), 32 N. W., 892.

Place of support. Oral to prove where, when contract for support was silent, is competent. *Young vs. Young*, 59 Vt., 342.

"Ruling rates." *Manchester Paper Co. vs. Moore*, 104 N. Y., 680.

For "$4 an order." Evidence to show meaning competent. *Newhall vs. Appleton*, 49 N. Y. Super. Ct., 238.

Receipt for goods by railroad company "care R. R. agent Callahan." Held ambiguous. Explainable by parol as to whether com-

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Admissible.

pany bound beyond terminus for delivery. *Savannah, Fla. & R. R. Co. vs. Collins*, 77 Ga., 376.

"Cold storage." Meaning can be proved. *Behrmann vs. Linde*, 47 Hun, 530.

Two interpretations of written contract. Oral evidence admissible. *Jenkinson vs. Monroe*, 61 Mich., 454.

Parol proof of capacity in which one signed an instrument competent. *Brewster vs. Baxter*, 2 Wash., 135.

A sale for $8,000 of 400 acres is sale in gross: no recovery for excess: but, being exact multiple, an ambiguity arises and oral evidence of intention is competent. *Hansford vs. Chesapeake Coal Co.*, 22 W. Va., 70.

"Entire walls inside and outside to be painted." Evidence of experts showed ambiguity. Held, oral evidence competent to show that it was not intended that inside plaster walls should be painted. *Beason vs. King*, 66 Wisc., 448.

Ambiguous contract. Oral evidence competent. *Turner vs. Berry*, 74 Ga., 481.

Wachtershausen vs. Smith, 10 N. Y. Supp., 535. "Season." duration may be shown.

Kendrick vs. Beard (Mich.), 45 N. W., 837. Said horses to be holden as security for payment. Oral whether mortgage or conditional sale intended, competent.

Louisville Banking Co. vs. Leonard (Ky.), 13 S. W. R., 521. Mortgage for fixed sum. Evidence given to secure future advances and amount competent.

Smith vs. Libby (R. I.), 20 Atl. Rep., 227. Contract authorizing agent to sell. No time mentioned. Same conversation afterwards limited time to six months. Held, competent.

Contra, 9 Gray, 243. As to oral conversation after signing same transaction.

Buford vs. Lowery in (Utah), 22 Pac. R., 164. Contract to sell cattle on ranges, except certain number. Oral as to steers reserved and ages competent.

Tufts vs. Greenwald (Miss.), 6 So. R., 156. Written order for soda water fountain "as soon as possible." Evidence of representations of agent, etc., and that "fountain in stock and not one to be manufactured" intended competent.

Clay vs. Field, 138 U. S., 464. "Received on settlement to this date." May be explained by oral evidence to refer to settlement for preceding year, and not for whole period of partnership.

Keller vs. Webb, 125 Mass., 88. "600 casks:" evidence of size of casks admissible.

Sandsbury vs. Blandys, 60 Ga., 646. "On my stock of all kinds in Twiggs Co.:" oral evidence of what stock competent.

Cassidy vs. Fontham, 14 N. Y. Supp., 151. Materials and labor for plumbing:" oral to show not to furnish ranges competent.

Cortes vs. Suban, Kan., 26 Pac. Rep., 720. Plans and specifications in a building contract were ambiguous, could not tell how many gables. Held, oral evidence competent.

Johnston vs. Patterson, 86 Ga., 725. A contract, silent or ambiguous, may be explained by oral evidence.

Brown vs. Doane, 86 Ga., 32. Whether writing, agreeing to pay for land when the vendor puts in the hands of the vendee chain of

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Admissible.

title from State to vendee, imports a duty on vendor to make efforts to procure such title to be delivered, if not in existence, is open to explanation by oral evidence, the language being ambiguous.

Sire vs. Rumbold, 34 N. Y. St. Rep., 59; s. c., 14 N. Y. Supp., 925. Lease recited that the landlord *intended* to build on the premises, and while the building went on rent to be $100 instead of $125 a month, as provided in first part of lease. Held, nature of improvements agreed to be made ambiguous. Oral evidence competent.

Schmittler vs. Simon, 114 N. Y., 184. To show a draft drawn on and accepted by an executor, only payable out of drawer's interest in an estate.

Bell vs. Tuttle, 81 N. Y., 454. Draft case; doubtful whether drawn on funds due or to grow due. Oral evidence admissible.

Ely vs. Adams, 19 Johns., 313 (*supra*).

Pearson vs. The Bank of the Metropolis, 1 Pet., 89. Demand at bank to change endorser.

Lawrence vs. Miller, 86 N. Y., 131. Time of performance of contract under seal may be fixed by parol.

Harriman vs. 1st Bryant Baptist Church, 63 Ga., 186. Charter party silent as to capacity. Oral to show amount paid fixed by carrying capacity.

Sharpe vs. Radebaugh, 70 Ind., 547. "Cost price or current rates." *Goff vs. Roberts*, 72 Mo., 570.

Bisbee vs. Woodbury, 8 Ill. App., 336. Judgment taken on one of two notes sued upon to answer plea of former judgment when suit brought on second note. *School Trustees vs. Rodgers*, 7 Ill. App., 33.

Hill vs. Miller, 76 N. Y., 32. Difference between two originals of the contract. Oral to prove which was the contract, competent.

Pierson vs. Atlantic Bank, 77 N. Y., 304. Individual notes of P. shown to be given for loans to bank.

Heysham vs. Dettre 89 Pa. St. 506. Sale of house. No mention of heater and gas fixtures. Oral evidence they were to pass.

Hartsell vs. Myers, 57 Miss., 135. Date of payment not fixed in lease. May be by oral evidence, showing situation and surroundings of parties.

Arthur vs. Roberts, 60 Barb., 580. Explain "I. O. U."

Perry vs. Smith, 34 Tex., 277. Indefinite stipulation.

Robinson vs. United States, 13 Wall., 363. Contract to deliver "first quality barley." Evidence of usage to deliver in sacks instead of bulk. Evidence tends to give precision to point left undecided by its terms.

Hannah vs. Shirley, 7 Or., 115. On face agreed in reference to thing. Oral as to subject matter. Competent.

Knapp vs. Harden, 6 Car. & Payne, 745. "In Nov." Oral evidence that it was agreed act should be done November 1 competent.

Clay vs. Field, 138 U. S., 464. "Received on settlement to this date." In settlement between partners or partnership of many years. Oral to show whether for whole time or only preceding year competent.

2 Phillips' Evi., p. 724, 4th Amd. Ed.

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Admissible.

Crawford vs. Jarrett's Adm., 2 Leigh, 660. Note payable to "Commissioners." Which, competent.

Maudine vs. Crenshaw, 3 Stew. & Port., 87.

United States vs. White, 2 Hill, 59.

Catlett vs. Pacific Ins. Co., 1 Paine, 584. Insurance to "owners." Which of them, competent.

Railroad Co. vs. Durant, 5 Otto, 576. Deed to "A Trustee." Oral competent to show for whom.

Moraney vs. Quarles, 1 McLean, 194. Agreement to compromise suit, nothing mentioned about costs. Oral agreement as to who was to pay competent.

Benson vs. Peebles, 5 Mo. R., 132. Oral evidence competent to show time, place and manner of performance of contract; silent as to them.

Stapp vs. Smith, 100 Mass., 63. Kind of card and size to be published under written advertising contract.

Blossom vs. Griffith, 13 N. Y., 569. "To be forwarded;" evidence that it was agreed defendant undertook as a "common carrier" instead of "forwarder" competent.

Price vs. Mowat, 11 C. B., N. S. Capacity in which servant was hired; writing silent.

Hoskett vs. Hoskett, 56 Barb., 467. Note included in "claims."

Haile vs. Peirce, 32 Md., 327. Officers of incorporated company made note; in body of note described as officers, but signed individual names. Held, on its face ambiguous; evidence competent to prove on whose account they signed.

Sharkey vs. Miller, 69 Ill., 560. Contract to build an elevator and put in heater. Price of latter not fixed. Subsequent conversation fixing price of latter competent.

Dudley vs. Vose, 114 Mass., 34. "Payable in trade;" evidence of private dealings and articles intended competent.

Havana R. R. Co. vs. Walsh, 85 Ill., 58. Sale of ties; oral, ties to be inspected before loaded.

Casey vs. Phil R. R. Co., 80 Pa. St., 363. Ambiguity.

Boalin vs. Dingling, 80 Ills., 608. Contract to build Court House. Wall of old Court House standing. Oral evidence competent to show extent of work to be done as to taking down or building on old walls.

Rockmaster vs. Jacobs, 27 La. Ann., 626; *Schackelford vs. Hooker*, 54 Miss., 716. "Payable after my advances are paid." Oral, to show whether prior or subsequent advances intended. Competent.

Stanford vs. Andrews, 12 Heisk (Tenn.), 664. Oral to identify notes imperfectly described in deed of trust competent.

Rhodes vs. Wilson, 12 Colo., 65. Deed to be made "subject to encumbrance of $2,500 to estate of J. M., deceased;" oral as to kind of encumbrance and time of payment competent.

Bulkely vs. Devine, 127 Ill., 406. Lease; ambiguity from omission of number of house. Competent to prove house intended.

Adams vs. Moran, 22 N. E., 708 (Mass.). Identity of deed.

Briggs vs. Groves, 9 N. Y. Supp., 765. Plaintiff to receive one-quarter net profits; evidence stock to be called $500, and profits on that valuation, competent.

When oral evidence is admissible to explain ambiguity. See 10 Amer. St. Rep., 317; note.

Subdivision III.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE CONTRACT IS AMBIGUOUS.

Not admissible:

McDonald vs. Dane (Mass.), 27 N. E., 993. Receipt for "$500 being amount received from lecture given by C. in Hollis Street Church for memorial window to put in said church as per agreement." Held, last three words ambiguous. Oral evidence competen to show whether they refer to $500 or to all that precedes.

Case vs. Phœnix Bridge Company, 11 N. Y. Supp., 724. Oral evidence competent to prove stipulation as to time to begin work under written contract silent on this point.

Case Manufacturing Co. vs. Soeman, 138 U. S., 431. Ambiguity as to person liable on written contract. Oral evidence competent.

S. P. Zahl vs. Cumberland Glass Co. (Ind.), 22 At. R., 271; *Hymers vs. Drake*, 5 Mo. App., 580. Order to pay "out of sales of lumber." Oral evidence that order was conditional on surplus of proceeds competent.

Goodrich vs. McClurg, 3 Neb., 123. To supply omission, contract ambiguous.

Hiser vs. Tenny, 36 Iowa, 80. Cornice case; suit for extra work and proof work was included under building contract.

Sanford vs. Newark, etc., R. R. Co., 37 N. J. L., 1. Contract to build bridge. Oral competent to prove plan and specifications referred to.

Thayer vs. Torrey, 37 N. J. L., 339. Fact that mortgage mentioned in two deeds is only one mortgage.

Lease with stipulation that it might be determined on payment of the sum of amount dollars—place blank. Held, a patent ambiguity not explainable by parol. *Vandecoart vs. Dorcy*, 42 Hun, 68.

Indebtedness—"Present and future." Witnesses could not be asked what indebtedness parties referred to. *Swain vs. Granger's Union*, 69 Cal., 186.

Judy vs. Gilbert, 77 Ill., 96.

Crooks vs. Whitford, 47 Mich., 283.

Lazear vs. Union Bank, 52 Md., 78. To raise and explain latent ambiguity in guaranty.

Norris vs. Hunt, 51 Tex., 609. *Palmer vs. Albee* (subscription of "20 acres of land"), 50 Iowa, 429.

The "Eli Whitney," 1 Blatchford, 360. No stipulation in charter party as to exact amount of cargo to be carried. Oral evidence not admissible to show what amount agreed.

Thorpe vs. Ross, 4 Abb. Ct. of App. Dec., 416. That contractor was to make necessary disbursement.

McLaren vs. Marine Bk. of Ga., 52 Ga., 131. To show note payable generally payable only at chartered bank.

Campbell vs. Johnson, 44 Mo., 247. Patent ambiguity.

105 N. C., 29. "Chas. Crawford's land" too indefinite. 150 Mass., 143.

Not admitted:

Patent ambiguity in clause in insurance policy; oral evidence incompetent. *Nashville Life Ins. Co. vs. Matthews*, 8 Lea (Tenn.), 499.

Contract for sale of land on payment of cash and delivery "of securities for deferred payments," oral as to kind of securities agreed upon, incompetent. *George vs. Conhaim*, 37 N. W., 791.

Subdivison IV.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE CONTRACT IS INFORMAL OR INCOMPLETE ON ITS FACE OR IN VIEW OF SURROUNDING CIRCUMSTANCES.

Admissible:

Plaintiff sued to recover commission for selling land under agreement, stating amount for which land was to be sold and plaintiff authorized to execute contract, but did not state terms of sale. Held, oral evidence admissible to show verbal agreement as to such terms. *Magill vs. Stoddard*, Wis., 35 N. W., 346.

Oral collateral agreement where memorandum is on its face incomplete is admissible. *Leicke vs. McCady*, 18 Mo. App., 143.

Written contract for commission on loan. Did not specify time in which loan to be made. Oral evidence competent. *Roberts vs. Matthews*, 77 Ga., 458.

Action on sealed instrument promising to pay, but stating no payee. Oral evidence competent to identify the one intended. *Barkley vs. Tarrant*, 20 S. C., 574; 47 Am. Rep., 853.

Specification referred to in building contract admissible though not signed, if identified by oral evidence. *Maxted vs. Seguaw*, 56 Mich., 129.

Incomplete contract. Oral evidence competent. *Bailey vs. Cornell* (Mich.), 33 N. W., 5 V.

Specifications referred to in building contract may be identified by oral evidence. *Bergin vs. Williams*, 138 Mass., 544.

Upon a contract by C. to deliver to S. "whatever quantity of coal S. may order between this date and January 1, 1880." Held, oral evidence as to the quantity intended is admissible. *Campbell vs. Short*, 33 La. Ann., 447.

If the note and mortgage do not correspond as to interest, oral evidence of intention is competent. *Payson vs. Lemoun*, 134 Mass., 593.

Bill of parcels not such a writing as excludes oral evidence. *Irvin vs. Thompson*, 27 Kan., 643.

Complete order and acceptance for iron pipe, August 27, 1884, and telegram, "The entire delivery to be completed within weeks from date; we will wire you to-morrow in confirmation of these deliveries."

Action by manufacturer against buyer.

Held, conversation August 27, prior to contract and subsequent telegram, competent to show that the blank was left until buyer, who was under contract to furnish pipe with *per diem* penalty, had ascertained his limit and then wired "nine" to put in blank. *Camden Iron Works vs. Fox*, 34 Fed. Rep., 200.

Guaranty that in saving of fuel engine should "be equal to that claimed for the Corliss"—oral evidence of what parties understood competent. *Wickes Bros. vs. Swift Elec. Light Co.* (Mich.), 38 N. W., 299.

T. W. Harvey Lumber Co. vs. Harman & Coal Lumber Co., 39 Mo. App., 214; *Work vs. Beach*, 59 Hun, 625. "In accordance with our agreement of Saturday." Evidence of that competent.

Kendrick vs. Beard (Mich.), 45 N. W., 837. "Said horses to be holden to seller as security for payment." Oral as to whether conditional sale or mortgage competent.

Subdivision IV.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE CONTRACT IS INFORMAL OR INCOMPLETE ON ITS FACE OR IN VIEW OF SURROUNDING CIRCUMSTANCES.

Admissible.

Smith ex. Crego, 54 Hun, 22. Explanation of letter.

Hagg ex. Hillsmeir, 120 N. Y., 651. Building contract according to specifications annexed. None were signed or annexed. Oral evidence as to specifications agreed on competent.

Buford ex. Lonergan (Utah), 22 Pac. Rep. 164. Contract to sell cattle on certain ranges except certain number of steers. Oral evidence as to steers reserved and ages competent.

Dana ex. Taylor (Mass.), 22 N. E., 65. Written agreement for a nonsuit silent as to costs does not bar oral agreement that if defendant paid the costs no new suit should be brought.

Appeal Real Estate Title Insurance Co., 125 Pa. St., 549. Written contract not specifying time of continuance. Oral evidence, parties did not intend indefinite time, but left the matter to subsequent agreement, competent.

Bill of goods signed by purchaser showing articles purchased, price and freight is not exhaustive. Oral evidence competent to show at whose risk shipment to be made and when title passed. *De Pauw ex. Kaiser*, 77 Ga., 176.

Hedges ex. Bowen, 83 Ill., 161. Guaranty to no one by name. Oral to show company intended.

Van Gorden ex. Sackett, 6 N. Y. Supp., 860. Agreement to deliver "about 200 bushels of buckwheat." Oral as to time and manner of payment competent.

See *Bunnell ex. Empire Laundry Machine Co.*, 5 N. Y. Sup., 591; *Rhodes ex. Wilson*, 12 Colo., 65. Deed to be made "subject to incumbrance of $2,500 to estate of J. M., deceased;" oral as to kind of encumbrance and when payable competent.

Hurd ex. Bacon, 7 N. Y. Supp., 241. Memorandum of sale of lumber in three lots, "terms two months;" price for first two lots named, but not last; held evidence, two months' notes to be given for all and price of last lot competent.

Louisville N. & A. Ry. Co. ex. Reynolds, 118 Ind., 170. Letter to plaintiff enclosing railroad passes to be full compensation for services in W. County for one year, "except for assisting in trials of cases against the company, other than stock cases. For such services if rendered, you are to receive reasonable attorney's fees." Oral to show what else done and value of services competent. *Bank of British North America ex. Cooper*, 137 U. S., 473.

2 *Phillips' Evid.*, 665; *Jeffrey ex. Walton*, 1 Stark., 267. "Six weeks at two guineas."

Knapp ex. Havnen, 1 Gale, 47.

McCulloch ex. Girard, 4 Wash., 292.

"*The Alida*" *Alb. Adm.*, 173.

Moraney ex. Quayles, 1 McLean, 194. Compromise of suit. No mention of costs. Oral agreement as to whom was to pay, competent.

Benson ex. Pebbles, 5 Mo. Re., 132. To show time, place and manner of performance of written contract, silent on those points.

Durham ex. Gill, 48 Ill., 151. Reference to other writings. Oral evidence competent to explain allusion.

Subdivision IV.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE THE CONTRACT IS INFORMAL OR INCOMPLETE ON ITS FACE OR IN VIEW OF SURROUNDING CIRCUMSTANCES.

Admissible.

Percy vs. Smith, 34 Tex., 277. Indefinite stipulation.

Robinson vs. United States, 13 Wall., 363. Contract. "First quality barley." Evidence that the agreement was to deliver in sacks and not in bulk.

Langdon vs. Hughes, 107 Mass., 272. Form of account entries may be explained.

Kinsman vs. Kershaw, 119 Mass., 140. Bill head "all moneys to be paid to the Treasurer." Payment to another good if no proof of actual notice of rule.

Kemp vs. Byne, 54 Ga., 527. Note "for one four pocket billiard table and fixtures, the said table to be subject for the purchase money." Whole contract admissible.

DeLaveillete vs. Wendt, 75 N. Y., 579. "Received of P. $500 due on demand."

Commissioners vs. McCalmont, 3 Penn R., 122. Reference to oral agreement in contract.

Sharp vs. Lipsey, 2 Bailey Rep., 113. Same point. In such cases it is not necessary that the writing should rebut the presumption of completeness.

Jeffrey vs. Walton, 1 Stark., 267. "Six weeks at 2 guineas."

Knapp vs. Harmen, 1 Gale, 47.

Plaintiff sued defendant for alleged loan of $75,000, and produced in evidence check to defendant's order for that amount, and envelope with endorsement in defendant's handwriting, "A. S. Whiton, 19 Broad St. Four months loan from Union Trust, amount $75,000; interest seven per cent.:" then followed list of securities on which loan made. Plaintiff also proved banker's custom to make loans in that way to avoid revenue tax on notes.

Held defendant could prove by parol that loan was agreed to be to one Kimball for whom he acted as broker and who owned collaterals. *Union Trust Co. vs. Whiton*, 97 N. Y., 172, 177.

Subdivision V.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE ORAL EVIDENCE CONTRADICTS OR VARIES WRITING.

Admissible:

Oral to show deed of homestead a mortgage and invalid is proper. *Brewster vs. Davis*, 56 Tex., 478.

May be shown that grantee under deed agreed to pay existing encumbrance. *Hays vs. Peck*, 107 Ind., 389.

Mortgage recited, notes dated October 27, 1884. Competent to prove against Sheriff notes produced of later date renewals of these. *Bigelow vs. Capen* (Mass.), 13 N. E., 896.

In ejectment plaintiff "Eldred. W. M.," may show he is the "Eldridge, W. M.," named in deed. *Mahberly vs. Mahberly*, 60 Md., 376.

Subdivision V.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE ORAL EVIDENCE CONTRADICTS OR VARIES A WRITING.

Admissible.

Deed in consideration of $1 and benefits of railroad does not estop grantor from showing that grantee verbally agreed also to grade a certain lot and to remove part of a warehouse. *Mobile and Mont. Ry. Co. vs. Wilkinson*, 72 Alabama, 286.

Where contract states consideration, oral evidence of additional things agreed to be done is competent. *Wood Mowing, etc., Co. vs. Gaertner*, 55 Mich., 453.

Seymour vs. Cowing, 4 Abb. Ct. of App. Dec., 200. (Oral evidence that notes exchanged were mere memorandums.)

Bissenger vs. Guiteman, 6 Heisk. (Tenn.), 277. (That parties agreed note should go for nothing.)

Thayer vs. Torrey, 37 N. J. L., 339. (Fact that mortgage mentioned in two deeds is only one mortgage may be shown.)

Reuder vs. Helms, 57 Ala., 440. (Oral evidence admissible to show notes of different dates were for single sale.) Overruling 47 Ala., 413.

Kerchiner vs. McRae, 80 N. C., 219. Agreement for credits on bond.

Oral evidence to contradict date in mortgage so as to show not true date from which fifteen days to record under statute was admitted. *Shaughnessey vs. Lewis*, 130 Mass., 355.

State vs. McDonald, 43 N. J. L., 591. Oral as to time of sale through written receipt, competent.

Potts Sons' Manufacturing Co. vs. Poor, 7 Ill. App., 24.

Gardner vs. The Collector, 6 Wall., 499. Date of approval of act. Date on record, December 24. Oral to add 1861, competent.

Hoppes vs. Beale, 90 Pa. St., 82. Oral: no liability on bond and mortgage and true consideration of deed.

Audendried vs. Walker, 11 Phila. (Pa.), 183.

Leach vs. Shelby, 58 Miss., 681.

Jackson vs. Miller, 32 La. Am., 432.

Dean vs. Adams, 44 Mich., 117.

Tillotson vs. Ramsay, 51 Vt., 309. Deed, A to B; competent to prove by parol consideration; was an agreement to sell A to C and C to B, and deed A to B on C's request.

Oral evidence admissible to contradict or vary the consideration acknowledged in the contract. *Mills vs. Dair*, 133 U. S., 423. *Clarkson vs. Deshon*, 12 Cush., 589.

Jones vs. Guaranty & Indemnity Co., 11 Otto, 622. To contradict mortgage and show real debt intended to be secured. See Hay case. *United States vs. Peck*, 12 Otto, 64; *Phelps vs. Clasen*, 1 Woolw., 204.

Hubbard vs. Gurney, 64 N. Y., 457. Joint maker of note may show he is surety and discharged by extension.

Oldham vs. Brown, 28 Ohio St., 41. As between parties for contribution on commercial paper.

Williams, Adm., vs. Macrees, Trustee, Va., 10 S. E., 1061. Relations of signers of bond where not against writing.

Case vs. Phoenix Bridge Co., 11 N. Y. Supp., 724, 58 N. Y. Super. Ct., 435. Contract as to work silent as to time to begin; oral evidence of agreed time to begin competent.

Oral evidence is admissible against contracts implied by law. *Susquehanna Bridge Co. vs. Evans*, 4 Wash., 481.

Subdivision V.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE ORAL EVIDENCE CONTRADICTS OR VARIES A WRITING.

Not admissible:

Phillips ex. Preston, 5 How., 278. Suit between 1st and 2d endorsers on agreement to share loss equally. Action not on note.

Bruce ex. Wright, 5 Thomp. & Cook, 81. Relation between endorser and endorsee, defendant not to be liable. s. c., 3 *Hun*, 548.

Where two have signed note jointly apparently it may be shown one signed as surety and payee knew it. *Harman ex. Hale*, 1 Wash., 422.

Deed stated consideration of $2,000. In action by grantors against grantee for this. Held, evidence of real consideration to do something, and that it was done, competent. *Twomey ex. Crowley*, 137 Mass., 184.

Oral evidence allowable to show relations between parties.

Welfare ex. Thompson, 83 N. C., 276. *I. e.*, whether joint maker or surety.

Col. Bank ex. White, 14 Nev., 373. Five obligors in building contract. Four might show they were bondsmen.

Pierson ex. Atlantic Bank, 77 N. Y., 304. Individual notes of P. given for loans to bank.

Harmickel ex. Brown, 45 N. Y. Superior Ct., 350. "For me." Competent to show for third parties' account, although transfer made from "me" to third party.

Phillips ex. Preston, 5 How., 278. Suit between first and second endorsers. Oral agreement to share loss equally, competent. Action not on note.

See Articles 8, Central Law Journal, 162, 222, 310; 3 Peters, 474.

Holden ex. Parker, 110 Mass., 324. Action of account against three persons on writing. Bill of sale to three evidence. Two to pay two-thirds, other one-third, and two had paid two-thirds. Excluded. Held error.

Bruce ex. Wright, 5 Thomp. & Cook., 81. Relation of endorser and (s. c., 3 Hun, 548) endorsee. Defendant not to be liable.

Contra. Martin ex. Cole, 14 Otto, 30. Not competent to prove oral agreement that blank endorsement was "without recourse" as between parties.

Vestal ex. Knight (Ark.), 15 S. W., 17. Relations on note may be shown by oral evidence.

S. P. Trustees of Schools ex. Southard, 31 Ill. App. 359.

Not admissible:

Letters constituting an oral agreement that there was to be no sale till inquiry as to solvency incompetent. *Reynolds ex. Robinson*, 37 Hun (N. Y.), 561. Reversed in Court of Appeals (see 18 N. E., 127; s. c., 110 N. Y., 654) on the ground of conditional delivery.

Covenant in deed implied from acceptance of deed containing covenant of warranty except certain taxes. Cannot be defeated by showing grantor agreed to pay these taxes. *Lead ex. Skies*, 81 Mo., 595.

When a party sues under rule in *Lawrence ex. Fox*, a writing cannot be varied as against *Cook ex. Durham*, 61 Wisc., 15.

Absolute conveyance cannot be turned into a trust by oral evidence. *Metcalf ex. Tully*, 91 Ind., 96.

Timber to be cut in a "reasonable time." Oral evidence of

Subdivision V.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE ORAL EVIDENCE CONTRADICTS OR VARIES A WRITING.

Not admissible.

definite time agreed on not admissible. *Jenkins vs. Lykes*, 19 Fla., 148.

Evidence that payment of a contract calling for money could be had in something else invalid. *Roundtree vs. Gilroy*, 57 Tex., 176.

Covenant in lease to deliver at end of term. Oral agreement as to holding over incompetent. *Kegan vs. Kinnaire*, 12 Ill. App., 484.

A contract contained in a receipt cannot be varied. *Alcorn vs. Morgan*, 77 Ind., 184.

Cannot vary mortgage by showing property to be released if sold by mortgagor. *Taylor vs. Trulock*, 55 Iowa, 448.

Order payable in money cannot show payable in anything else. *Kimball vs. Bryan.*

Action for breach of covenant of warranty. It cannot be shown that plaintiff agreed to take subject to defect and agreed to remove it. *Beer vs. North*, 107 Ind., 544.

A sued on a bond in which he was described as surety. Held, plaintiff could not show A was the principal. *Coats vs. Farnsworth*, 61 Mich., 407.

One who has signed note and mortgage cannot show by parol he was acting for another and was not to be bound. *Junge vs. Bowman*, 72 Iowa, 648; S. P. *Bullwinkle vs. Cramer*, 27 S. C., 376.

Oral evidence not permissible to show real consideration different from that mentioned in deed. *Met. Bk. vs. Hitz*, 1 Mackey (D. C.), 111.

Oral evidence writing a fraud and prices put in to deceive others incompetent. *Hutton vs. Maines*, 68 Iowa, 650.

"Solid rock" cannot be explained. *Frain vs. Crystal Ry. Co.*, 89 Mo., 397.

Tenant agreed to give in writing certain number of bales of cotton as rent. Not competent to show oral agreement to give cotton seed. *Powell vs. Thompson*, 80 Ala., 51.

Notes cannot be varied. *Raynor vs. Drew* (Cal.), 13 P., 866; *Doss vs. Peterson* (Ala.), 2 So., 644.

Unambiguous release. Oral to show other matters embraced therein is incompetent. *Brady vs. Read*, 94 N. Y., 631.

Oral evidence not admissible to vary legal effect.

Martin vs. Cole, 14 Otto, 39. Not competent to prove blank endorsement was "without recourse" between endorser and endorsee. "*The Delaware*," 14 Wall., 379. *Brown vs. Spofford*, 5 Otto, 474.

Jackson vs. Belling, 22 La. Ann., 377. Where law prescribes term of lease, oral evidence of usage not admissible to fix term when parties have not fixed it.

McLaren vs. Marine Bank of Ga., 52 Ga., 131. To show note payable generally only payable at chartered bank.

Written contract failed to state time when fence to be built. Oral evidence as to this incompetent. Reasonable time. *Kankakee, etc., R. R. Co. vs. Fitzgerald*, 17 Ill. App., 525.

Where a note is in law A's contract, oral evidence parties understood it to be B's incompetent. *Davis vs. England*, 141 Mass., 587.

Bill of sale cannot be shown to be bailment. *Allen vs. Bryson*, 67 Iowa, 591.

Subdivision V.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE ORAL EVIDENCE CONTRADICTS OR VARIES A WRITING.

Not admissible.

Willse vs. Whittaker, 22 Hun, 242. Note payable in one day; not competent for accommodation endorser to prove oral agreement he was to have four months.

Russell vs. Russell, 64 Ala., 500. "Children" to mean "grandchildren" in insurance policy.

Carlton vs. Vineland Wine Co., 33 N. J. Eq., 466. Oral, to vary bond and mortgage and bill of sale incompetent.

Smith vs. Odom, 63 Ga., 499. Deed; oral reservation of buildings.

Porter vs. Sandige, 32 La. Ann., 449; *Keller vs. Webb*, 126 Mass., 393. Written for particular kind of blacklead; oral, casks to contain "pure lump lead."

Mussell vs. Flood, 45 N. Y. Super. Ct., 460.

Ragsdale vs. Gassett, 2 Lea. (Tenn.), 729. Oral evidence to change note of husband and wife in ordinary form to note charging wife's separate estate.

Carpenter vs. Jamieson, 6 Mo. App., 216. A receipt acknowledging settlement of all demands cannot be varied.

Winn vs. Morehead, 52 Iowa, 64. Oral evidence of reservation to rent in contract of sale where deed shows none.

Farrar vs. Hages, 51 Md., 498. Trust deed in favor of releasing creditors; oral evidence that it was also in favor of non-releasing creditors incompetent.

Proctor vs. Cole, 66 Ind., 576. Written transfer with agreement of re-transfer; oral evidence that it was a sale incompetent.

Whitmore vs. Learned, 70 Me., 276. Oral evidence to show grantee named not the true grantee is not admissible.

"*The Delaware*," 14 Wall., 579. Bill of lading silent as to mode of stowing goods—imports—under deck. Oral evidence of agreement they might be carried on deck inadmissible.

Barnes vs. Scott, 117 U. S., 582. Note cannot be shown to be mere memorandum.

De Witt vs. Berry, 134 U. S., 306. Oral cannot add warranty to written bill of sale.

Jackson vs. Belling, 22 La. Ann., 377. Where law fixes term of lease, usage not admissible to show term where parties have not fixed by expressed agreement.

Colt vs. Coar, 107 Mass., 285. Not admitted to change short memorandum.

Bookstaver vs. Jayne, 3 Thomp. & Cook, 397. Action on note incompetent to prove agreement to apply same on claim and discontinue another suit.

McMillan vs. Parkell, 64 Mo., 286. Signing an obligation describing him as principal cannot show by oral evidence he is surety and discharged by extension of time.

Goodwin vs. Fox, 129 U. S., 601. To contradict acknowledgment of debt in trust agreement.

Dulaney vs. Burke (Idaho), 23 Pacif. R., 915. Oral to vary promissory note given for one-half interest in mine; *i. e.*, that payee might examine and reject it.

Chemical Elec. Light & Power Co. vs. Howard, 150 Mass., 495. Patent to be "in full force and effect" or defendant not liable on

Subdivision V.

EXCEPTIONS TO THE RULE THAT ORAL EVIDENCE IS NOT ADMISSIBLE WHERE ORAL EVIDENCE CONTRADICTS OR VARIES A WRITING.

Not admissible.

note; oral evidence that defendant meant not lapsed by failure to pay fees, but agreed to take risk of invalidity, incompetent.

Genet vs. Del. & Hudson Canal Co., 56 N. Y. Super. Ct., 27.

The "Augustine Kobbe," 37 Fed. Rep., 696.

Fay vs. Gray, 124 Mass., 500.

Drake vs. Starks, 45 Conn., 96. Release of all debts. Oral evidence certain note not included, incompetent.

Spencer vs. Bacon, 41 Mich., 149. "All the saw logs cut and skidded" could not show meant also logs *to be* cut and skidded, though vendor then doing it.

Barnard vs. Garlin, 23 Minn., 192. Oral to vary contract of endorsement.

Third National Bank vs. Clark, 23 Minn., 263. Oral to vary contract of endorsement.

Hauer vs. Patterson, 84 Pa. St., 274. Oral to vary contract of endorsement.

McMillan vs. Parkell, 64 Mo., 286. One signing an obligation describing himself as principal cannot show he was surety and discharged by extension.

Tutt vs. Schwamb, 80 Ill., 289. Partnership articles showed in legal effect one-half profits to each. Oral to vary shares, incompetent.

Coats vs. Farnsworth, 61 Mich., 497. Relations of signers of bond.

Barnes vs. Scott, 117 U. S., 582. Note cannot be shown to be mere memorandum.

THE ELECTRIC PRINTING CO., 23 and 25 N. Warren St., Trenton, N. J.

UNITED STATES SUPREME COURT.

DELOS E. CULVER,
Plaintiff in Error,
v.
GEORGE WILKINSON, Receiver of the American Trust Company of New Jersey,
Defendant in Error.

STATEMENT OF THE CASE.

GEORGE WILKINSON, receiver of the American Trust Company of New Jersey, the defendant in error, recovered a judgment against the plaintiff in error, DELOS E. CULVER, May 31st, 1879, for $54,263.33, damages and costs, in the Supreme Court of New Jersey.

Upon this judgment suit was brought by the defendant in error, a citizen of New Jersey, against the plaintiff in error, a citizen of New York, in the Circuit Court of the United States for the Southern District of New York, summons wherein was issued December 3d, 1883.

The complaint (Record, pages 5 to 19) sets out an exemplification of this judgment, duly made according to the acts of congress, and gives credit for certain payments subsequent to the recovery.

The answer to the complaint (Record, pages 21 to 33) admits the citizenship; that the New Jersey Supreme Court was a court of general jurisdiction; that Culver was duly summoned in an action therein; that on May 3d, 1879, Wilkinson, as receiver, recovered judgment in said court against Culver for $54,263.33; that the copy of the judgment roll is set forth in the complaint, and that Wilkinson was such receiver.

It denies the fifth allegation in the complaint, to wit, that the judgment has not been paid except as stated; denying further that the credits given are correct, and alleging that larger sums should be credited on the judgments. It further denies that no part of the balance alleged has been paid, and that the balance is what the complaint says, and sues for.

It then alleges that the judgment was obtained by fraud; that, upon information and belief, the judgment had, under and by virtue of facts thereinafter stated, been paid. Still (Record, page 22, paragraph 8) it alleges that the credits alleged in the complaint are credits arising upon sums alleged to have been realized by said receiver out of the collaterals held by him to secure said judgment thereafter mentioned; that defendant had never in any way recognized the validity of the judgment *or made any payment thereon except in the manner thereinafter stated.*

The answer then enters upon "a history of the transactions out of which said judgment arose," and goes back to 1873, when Culver borrowed $75,000 from the American Trust Company, as he says, usuriously, which, by New Jersey law, denied the lender a right to recover more than the amount actually loaned, without interest or costs; that collateral to this loan Culver gave forty-nine first-mortgage bonds, called Western Extension Bonds; that in September, 1873, he failed and was put into bankruptcy, was adjudicated a bankrupt, and December 1st, 1874, was discharged as such. He proceeds to say that, being desirous to pay debts, which he calls individual debts, he told the president of the company that by his knowledge he could

make some of his assets turn out very valuable. Thereupon McGregor authorized him to buy those claims, and agreed to consider whatever the company received thereout as payment to that extent on such discharged indebtedness, and Culver did buy in McGregor's name, October 28th, 1875, a claim against Allen, Stephens & Co. (about $25,000) for $5; one against George Opdyke & Co. (about $600,000) for $2, and one against the New York and Oswego Midland Railroad Company for $2.

In January, 1876, he laid his plan before John McGregor and Daniel M. Lyon, officers of said trust company. He proposed that the company should lend him $5,000 more with which to purchase Rockland Central Railroad Bonds for $13,000 and $7,000 of Ridgefield Park Bonds; he would renew his discharged indebtedness of $30,000 and become liable for this $5,000. He says substantially, in the rest of his answer, that the company agreed to prosecute these claims, pay themselves out of their results, their expenses and the discharged and new debts, and hand the balance over to him. This, he says, the company neglected and refused to do, and so he had suffered damage enough to extinguish the judgment claim, and, in addition, he claimed judgment against the plaintiff in the action for $73,336.87, with interest.

The case came on to be tried November 9th, 1887, before Hon. Nathaniel Shipman.

Plaintiff's counsel (Record, page 36) asked the court to render judgment for the amount of principal and interest of the judgment of the Supreme Court of New Jersey in the complaint mentioned, and the recovery of which the answer admitted, the answer expressly stating also that no other payments in money had been made upon said judgment, except as stated in the complaint, and to strike out all of said answer, except said admissions, as irrelevant and inadmissible.

This the court declined, and sealed an exception.

The case then proceeded. Plaintiff's counsel offered the exemplified judgment and the admissions of the answer in evidence, and rested.

The defendant's counsel then called his client as a witness, who produced and proved a paper called a contract, bearing date

and said to be made February 24th, 1876, in the following words and figures:

"Whereas, Delos E. Culver, of Jersey City, N. J., is indebted unto the American Trust Company, of Newark, N. J., in the sum of thirty-nine thousand six hundred and thirty-one and twenty-nine one-hundredths dollars ($39,631.29), for which indebtednesss he has given said company his five certain notes or obligations, dated this day, one, $4,631.29, due June 27th, 1876; one, $8,750, due August 27th, 1876; one, $8,750, due November 27th, 1876; one, $8,750, due February 27th, 1877, and one, $8,750, due May 27th, 1877, all with interest from date.

"Now, therefore, the said American Trust Company hereby declares that it holds, for the benefit of said Delos E. Culver, certain choses in action, stock and bonds, more particularly described as follows:

"Chose in action against Allen, Stevens & Co.

"Chose in action against Geo. Opdyke & Co. and N. Y. and O. M. R. R. Co.

"Claim for four thousand shares of the capital stock N. Y. and O. M. R. R. Co.

"Forty-nine bonds of the N. Y. and O. Midland R. R. Co., western extension.

"Thirteen bonds of the Rockland Central R. R. Co.

"Seven bonds of the Ridgefield Park R. R. Co.

"The proceeds arising from the sale of said securities and recovered from said choses in action are to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E. Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.

"In witness whereof, the American Trust Company has caused its treasurer to set his hand, this 24th day of February, 1876, at Newark, N. J.

"W. A. WHITEHEAD, *Treasurer.*

"Witness—JOHN MCGREGOR."

Thereupon, counsel for defendant below, here plaintiff in error, sought to give testimony of contemporaneous, precedent and subsequent oral agreements, whereby the company agreed,

as he alleged, to prosecute some of these claims mentioned in the declaration of trust, paying the expenses, and to advance moneys and exchange certain bonds for stock or like security upon reorganization of insolvent corporations, the failure of performing which alleged agreements, he contended, had produced great damage to him, which damages, he insisted, he could apply first to the discharge of the defendant in error's judgment, and then could recover the balance from the plaintiff.

This class of testimony the court refused to hear. The refusals of its various particulars are the groundwork of the exceptions taken.

The court (page 39) said, "You can show what the circumstances were surrounding the execution of this document," but also said (page 40):

"The Court—I will not admit testimony of any oral communication in regard to what was to be done by the trust company with this collateral security. If you have a witness to prove an independent agreement upon the part of the trust company, involving the expenditure of money or the performance of things by them in regard to it, then the rule in regard to the altering, adding to or varying a written contract is a different thing."

At a subsequent stage of the cause (Record, page 67), Mr. Culver's counsel asked leave of the court to withdraw from the case that portion of the answer which alleged fraud in obtaining the judgment in New Jersey, and everything tending to prove this was excluded.

At the close of the evidence (Record, page 75), counsel for defendant below proposed to sum up the case to the jury. The court said:

"The Court—I have already stated my idea of the legal character of this contract; that there was no obligation on the part of the trust company to sell the stocks and bonds, except upon a request of the pledger; and there was no obligation to prosecute the claims to suit at their own expense, although such prosecution might have been requested by the pledger; and there is no evidence that there was any request to sell the securities;

and there is no evidence of what the law calls negligence on the part of the trust company."

A verdict was directed and rendered for the plaintiff below.

The errors assigned may be classified thus:

1. Errors in excluding evidence thought to alter or add to the written contract between the parties, and

2. Evidence that he requested the company and the receiver to prosecute these claims, named in this paper, without offering himself to pay the expenses thereof.

3. Error in allowing plaintiff below to open and reply.

4. Error in directing the verdict for plaintiff.

We shall discuss these in reverse order.

I.

The directing a verdict for the plaintiff was no error, but was the reparation of an error against the plaintiff with which the trial began.

The action, be it remembered, was simply a suit on a New Jersey judgment. The record, duly exemplified, was annexed to and formed part of the complaint. The answer admitted that the defendant in that New Jersey suit was duly summoned. Record, pages 5 and 21. It admits likewise (Record, page 21, paragraphs 2 and 3) that the judgment was recovered as stated, and the copy of the judgment roll set forth. It admits, also (Record, page 22, paragraph 8), that defendant had never made any payment on this judgment "except in the manner hereinafter stated." And the "manner thereinafter stated" is, that by reason of breach of contracts *before* the suit which resulted in the judgment, right of action had accrued to the defendant against the company of which the plaintiff in the suit was receiver, for damages to an amount enough to equal the amount of the judgment, and to give him $73,336.67 besides; for which he asked judgment against the receiver.

In other words, defendant, admitting that he had paid no money, set up that he had a set-off which, if allowed, paid the judgment.

Now, payment in money is a good defence to an action on a judgment. But set-off of damages existing before the judgment suit, and damages unliquidated, is not a defence to such an action—because, if it was a legal set-off, it should have been set up in that suit, and if not, *a fortiori*, it was inadmissible.

So, the judgment being admitted and confessed not to be paid, what was there for a jury? It was a case of a suit on a judgment only, and a judgment not pretended to be at all reduced. Of such a case trial is by record by the court—there is no issue for a jury.

The argument below was, that the plaintiff, having come to New York to sue and enforce his judgment, subjected himself to New York law, and that the statute of that state permitted such a defence as was set up. But the United States constitution provides (article IV., section 1) that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may, by general law, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." And this court has adjudicated, in Christmas *v.* Russell, 5 Wall. 290, that a state statute which enacted that there should be a defence on a suit upon a judgment in its courts, when the defendant was one of its citizens, of the statute of limitations in *his* state, and not the statute of the other, is an unconstitutional and void statute, forbidden by the article of the constitution quoted.

The case is instructive as to the practice which should have been pursued in this. One plea (page 299) "was *nul tiel* record, but *the finding of the court* under the issue joined negatived it." Third plea was *payment*, to which plaintiff replied and the jury found in his favor.

That practice, adopted in this cause, would have left the judgment to the court, and there being no plea of payment, only of set-off or counter-claim, there was no issue for the jury, because set-off and counter-claim, as set up, was no defence. "*Full* faith and credit" was due to the judgment record. It could not be *full* if this counter-claim was allowed, and even though authorized by a New York statute. The credit and faith to be given in New York was exactly that which belonged to the judgment if sued on in New Jersey. The United States constitution

required that the law of New Jersey should be enforced in New York.

Mills *v.* Duryee, 7 Cranch 481.
Hampton *v.* McConnell, 3 Wheat. 234.
Jardine *v.* Reichert, 10 Vr. 165.
Green *v.* Van Buskirk, 5 Wall. 307.
Cheever *v.* Wilson, 9 Id. 123.
Montgomery *v.* Samony, 98 U. S. 482.
Colt *v.* Colt, 111 Id. 573.

In a suit brought on a judgment recovered, if the same was rendered in a court of general jurisdiction, a cause is presumed to be within it, unless the contrary appears. Nothing can be averred against the validity of its record, nor, as a general rule, can any plea or proof be admitted to the contrary. If the existence of such record be denied, it shall, like other records, be tried by nothing but itself; that is, by inspection whether there be such record or no, else there would be no end of disputes. No matter of defence can be pleaded which existed anterior to the recovery of the judgment, nor can the original defendant, or his bail or sureties, plead that it was obtained by fraud. It is subject to correction only in an appellate court.

Van Doren *v.* Horton, 1 Dutch. 1207, 1208.

A judgment is conclusive not only as to matters which are, but also as to those which might have been, litigated and determined in the action.

Jordan *v.* Van Epps, 85 N. Y. 427.
Petersham *v.* Thomas, 28 Ohio St. 596.
Parnell *v.* Hahn, 61 Cal. 131.
Bates *v.* Spooner, 45 Ind. 489.
Baird *v.* United States, 96 U. S. 430.
Secor *v.* Sturgis, 16 N. Y. 598.
White *v.* Merritt, 8 Id. 352.
Homer *v.* Fish, 1 Pick. 435.
See other case in Steph. Dig. Ev. (Chase's ed., 1886, notes to page 86).

Under this law the counter-claim set up by the plaintiff in error was inadmissible for two reasons—*first*, because it was based upon matters anterior to the recovery of the judgment; *second*, because no such counter-claim was admissible. No claim for unliquidated damages can be set off.

The right to set-off is regulated in New Jersey by statute. It provides (Revision, p. 1096) "that if any two or more persons be indebted to each other, such debts or demands *not being for unliquidated damages*, may be set off against each other, and if one of such debtors shall commence an action against the other in any court of this state, it shall be lawful for the defendant at the trial to set off, as against the plaintiff, the debts or demands which may be due and owing to him as aforesaid; and any defendants failing to set off such debts or demands shall thereafter be precluded from bringing any action for such debt or demand which might have been set off by virtue of this act." The defendant in any such action, in order to avail himself of such set-off, shall plead the same or give notice thereof in writing annexed to the plea by him filed in the action.

Recoupment is unknown in New Jersey and to the common law, and exists in this state only by virtue of the enabling provision in the one hundred and twenty-ninth section of the Practice act. The privilege thereby conferred is, in express terms, confined to "actions on contracts not under seal." The language is so definite and clear that no room is left for discussion as to its meaning.

"In actions on contracts not under seal, the defendant may set up as a defence in abatement of the damages to be recovered by the plaintiff, a defect in, or partial failure of, the consideration of the contract sued on, and may also recoup any damages which he may have sustained by reason of the non-performance or defective performance of any part of the same contract by the plaintiff, provided that a notice of the particulars of such defence be annexed to the plea and filed therewith." Rev., p. 868, pl. 129.

Price *v.* Reynolds, 10 Vr. 172.

By the terms of that section it is restricted to damages arising out of the non-performance or defective performance of the same

contract which is sued on. In this case the contract sued on was the implied undertaking arising from the furnishing of the extras on the stable. The recoupment claimed was upon the sealed contract.

Beyarth *v.* Dudley, 15 Vr. 313.

There is undoubtedly a technical distinction between set-off and recoupment. Judge Bronson, in Barthenson *v.* Pierce, 3 Hill 174, thus describes them: "When the demands of both parties spring out of the same contract or transaction, the defendant may recoup, although the damages on both sides are unliquidated; but he can only offset when the demands of both parties are liquidated or are capable of being ascertained by calculation."

Parker *v.* Hart, 5 Stew. Eq. 230.

Now, the action on the judgment is upon a contract—rather upon something higher even, a *fiat* of the law—or else upon the implied *assumpsit* growing out of the judgment. A suit upon a foreign judgment may be thus treated.

Perhaps it is not true that there can be no set-off in a suit upon a judgment. But it is certainly true that the matters set up in this so-called counter-claim are groundwork for unliquidated damages. Therefore, there can be no set-off.

And there cannot be recoupment, because, in the first place, there is no contract here not under seal, and, secondly, the damages do not arise out of the judgment, or of the *assumpsit* to pay the judgment. They were suffered, if at all, long before the judgment. And, besides, how could damages either occasioned by the negligence of the insolvent company, or of its receiver who held as trustee, be recovered against him as an individual? Plainly they would not run against the trust company or its assets.

It was a mistake, then, for the learned judge below to allow any evidence tending to prove this so-called counter-claim. It was time thrown away. He should have done in the beginning what he did at the end—direct a verdict for the plaintiff.

II.

Again, directing a verdict for the plaintiff was no error, because on the proof for the defendant there was no evidence to go to the jury at all, except the judgment. The rulings of the court had left no evidence in the case to support the contention of the defendant.

What had he proved? An instrument not under seal of the corporation, but under the signatures of its officers—an instrument quite unique in its nature, considering all the circumstances.

Mr. Culver had owed the trust company a large sum of money. He had been thrown into bankruptcy by other creditors—been declared a bankrupt, and afterwards discharged. His assignee advertised a sale of his assets. Culver told a leading director (McGregor) that certain of these were valuable (Record, pages 24–5); that they would probably sell for small sums, and gave information as to the collectibility and probable expense of collecting them. McGregor authorized Culver to buy these claims. He thereupon bought for McGregor, for $9, three claims, giving $5 for one, $2 for another, $2 for a third.

Culver then proposed that the company should lend him $5,000 more, with which to buy certain other bonds and stocks, that he would then give his notes for his old indebtedness as well as this new, for which the company should hold all these securities as collateral. The result of his diplomacy was an instrument (Record, page 38) in the nature of a declaration in trust, by which the company declares that it held for the benefit of Culver the securities and claims named. There was no agreement that the trust company should prosecute them—no agreement in terms, whatever. The paper provided that the proceeds arising from the sale of said securities and recovered from said choses in action were to be applied to pay off said notes and interest, and the remainder is to be paid to said Delos E Culver or his legal representatives, subject to the repayment of moneys expended by said American Trust Company in prosecuting claims or selling the securities.

Proof was offered that, by verbal agreement, immediately

before or at the time of the signing this paper, the company had agreed to prosecute these claims or make sale of the securities.

Such proof, offered in various ways and with great perseverance, was rejected.

The court summarized its opinion and its action on page 40. We quote anew: "I will not admit testimony of any oral communication in regard to what was to be done by the trust company with this collateral security. If you have a witness to prove an independent agreement upon the part of the trust company, involving the expenditure of money or the performance of things by them in regard to it, then the rule in regard to the altering, adding to or varying a written contract is a different thing."

So, there being no evidence for the jury, the course of the court in *directing a verdict* was no error.

III.

The plaintiff in error cannot succeed unless he convinces this court, *first*, that it was his right that the court below should admit his defence of counter-claim and set-off of matters existing prior to the judgment sued upon, and confessed by him to be no further paid than alleged by the defendant in error; matters inadmissible by the law of New Jersey, not only because they could have been set up, if legal, in the action which resulted in the judgment, but also because they were not the subject of set-off or counter-claim; and, *second*, that the learned judge below erred in his rejection of evidence offered to add to or alter the written instrument given in evidence, or in his ruling that that instrument did not contain or imply any contract whereby the trust company was bound to prosecute the claims or dispose of the stock mentioned in it.

To these two last topics attention is now to be given—

1. Was the evidence offered rightly rejected?

It would seem impossible for any legal mind to disagree with the court below on this point.

No new, additional agreement was pretended. No consideration for one is suggested.

It would be idle to quote authorities in support of the exclusion of this testimony. It is the A, B, C of the law of evidence in regard of contracts.

The first offer is seen at Record, page 39. Objection being made, the court said, "You can show the circumstances surrounding the execution of this document."

The same offer was renewed afterwards. See Record, pages 40, 41, 42, 43, 44, 45, 47.

2. Did the instrument given in evidence contain or imply any contract whereby the trust company was bound to prosecute the claims or dispose of the stock mentioned in it?

It may be observed that this instrument was peculiar. It was strictly considered no evidence of a pledge or mortgage. No pledge or mortgage can exist unless, in the one case, the pledger deliver the thing pledged to the pledgee—in other words, make a bailment to be retained till payment of a debt be made; in the other, the mortgagor conveys the realty or personalty mortgaged to the mortgagee, with a condition that the sale shall be void when the mortgagor shall pay a specified debt. In neither of these cases does a duty devolve upon the pledgee or the mortgagee to do anything more than hold the property till the debt is paid.

The only exception to this is when the contract accompanying the pledge or mortgage is special, and calls upon the creditor to pay himself, through prosecution or sale.

If this instrument is to be regarded as creating a pledge or a mortgage, then, inasmuch as there is no contract on the part of the trust company to prosecute or to sell, but only the expression of the power to do so, the learned judge was right in his opinion and in the course he pursued.

But there was here no pledge, because Mr. Culver delivered nothing to the trust company; no mortgage, because *he* conveyed no title to it. The trust company bought, at an auction, from Mr. Culver's assignee in bankruptcy, certain securities and claims which had once belonged to him. Their title, whether by delivery or conveyance, came from Culver's assignee. That it was on his recommendation, or upon a previous arrangement that the

company should buy, is nothing. Culver did not buy. As agent for the company, he bought for it.

This is true as to the Stevens claim, the Opdyke claim and the Midland railroad stock claim. The trust company had the property as their own.

As to the rest, they supplied him $5,000 more than he had had from them, to use in the purchase of certain securities. The purchase was for them. The bargain was to hold them. The manipulation of these stocks was not agreed to be made by the company. In consideration of his renewing his old indebtedness existing prior to his bankruptcy discharge, they lent him this additional sum, and agreed that after paying themselves the indebtedness, old and new, they would, when they received it, pay over the balance to Mr. Culver.

This instrument was in form and in fact a declaration of trust, more like a Virginia mortgage than anything else, equivalent to a receipt of properties or choses in action as collateral security, but making no contract to prosecute or to sell, though the transaction gave them power to do either.

If the instrument was a contract binding on the company at all, it only bound it to hold till Culver paid, with power to sell or hold, in their discretion; but if they sold, then the company was to pay over the amount less the charges, when received.

The speculative character of these claims and choses in action, their intricacy, the risk and expense likely to attend their enforcement, are proof enough that the parties never could have intended any such contract as that asserted by Mr. Culver.

But such contract never would be implied. It would have made the company the servants of this type and illustration of all wild speculation, and increased his indebtedness to them five fold.

Let us now examine the so-called memorandum contract more particularly. See Defendant's Exhibit 17, pages 77, 78.

It first recites indebtedness, particularizing the notes given by Culver.

It then "*declares*," such is the word used, that it holds for the benefit of Culver certain choses in action, stock and bonds, specifying them.

There are among these four thousand shares of capital stock,

Y. and O. Midland R. R. Co., and certain r
e different companies.

ad the paper stopped there, it would have e
be deduced from what follows—the transf
implied power, under circumstances, to sell
if such power was exercised, then the resul
posed of, first, to pay the expenses of sale or p
to pay the debt. But the power could not be la
in either case, without distinct request, befor
Culver, proved or implied from conduct. Nor
bound to exercise this power, even if Culver req

It is insisted that this statement of the law is c
plete. The principles of the law of pledge apply
tion, if, indeed, this voluntary declaration create

Now, what more does what follows in the p
language is: "The proceeds arising from the sal
ties and recovered from said choses in action are
pay off said notes and interest, and the remaind
to said Delos E. Culver or his legal representa
the repayment of moneys expended by said A
Company in prosecuting claims or selling the sec

That is, *if* the American Trust Company
claims, or *if* it sells the securities, then the mo
applied in the way mentioned.

On page 91, the difference between the court
for defendant is succinctly stated.

"Mr. Clark, on behalf of the defendant, prop
the case. The defendant's counsel claimed that
evidence meant that the trust company were to
and sell collaterals in a reasonable time. The c
him, saying: 'I have already stated my idea of
acter of this contract, that there was no obligatio
the trust company to sell the stocks and bonds
request of the pledgor. And there was no obli
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there is no evidence that there was any request t
ties; and there is no evidence of what the law
on the part of the trust company.'"